



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

### Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

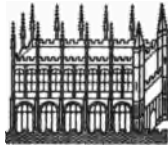
### About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

Cw. U.K.

X 540

5974b



Bodleian Library Oxford

L.L.

X Cw. U.K.

540

59746











CASES  
OF A  
WIFE'S SEPARATE ESTATE  
AND  
EQUITY TO A SETTLEMENT  
OUT OF  
Her Equitable Property.

LONDON:  
C. ROWORTH AND SONS, BELL YARD,  
TEMPLE BAR.

Am Vt  
X 500  
50000

CASES  
ON A  
WIFE'S SEPARATE ESTATE  
AND  
EQUITY TO A SETTLEMENT  
OUT OF

**Her Equitable Property :**

VIZ.

SCARBOROUGH V. BORMAN,  
TULLETT V. ARMSTRONG,  
DIXON V. DIXON,

NEDBY V. NEDBY,  
STEAD V. NELSON,  
NEWLANDS V. HOLMES, and

STURGES V. CHAMPNEYS.

WITH  
NOTICES OF THE EARLIER DECISIONS.

---

BY GEORGE SWEET,  
OF THE INNER TEMPLE, ESQ. BARRISTER AT LAW.

---

LONDON :  
S. SWEET, CHANCERY LANE, & V. & R. STEVENS & G. S. NORTON, BELL YARD,  
**Law Booksellers and Publishers.**  
MILLIKEN AND SON, GRAFTON STREET, DUBLIN.

1840.



•

## ADVERTISEMENT.

---

**THE** leading principles of the doctrines of Separate Estate, and of a Wife's Equity to a Provision out of Property held in Trust for her, having been finally (*a*) settled in some recent decisions by the Lord Chancellor, and both subjects having been involved in some of the earlier cases, it is hoped that the publication of these decisions together, in the present form, will not be unacceptable to the Profession.

13, *Southampton Buildings*,  
*January, 1840.*

(*a*) It is understood that there will be no appeal in any of the cases alluded to.



## SEPARATE ESTATE.

---

THE course which the authorities have taken upon the subject of separate estate, is a very instructive example of the danger of ostensibly founding decisions in courts of equity upon dry technical rules, when the real inducement which sways the judge is a consideration of the general policy and utility of the doctrine which he is establishing. The whole of the difficulty which has been experienced in the present instance is traceable to the timid language used by Lord Eldon, in deciding, in the case of *Brandon v. Robinson* (a), that a declaration against anticipation in a gift of a fund to a man during his life, did not prevent his assignees in bankruptcy from selling his life-interest. The impolicy of allowing property to be vested in a man which shall not be accessible to his creditors, and upon which his most solemn engagements shall be inoperative, is obviously the true ground upon which a court of equity ought to refuse to give effect to such a restriction, and was no doubt the consideration which led to the judgment pronounced by Lord Eldon; but his Lordship habitually preferred catching at the shadow of a precedent or established principle, to avowing a new principle, however equitable, and within the province of his authority. He said, "Without doubt a testator may limit his property until the object of his bounty shall become bankrupt; but it is equally clear, that if he give it for life, he cannot take away the incidents to that estate; the difference is very great between giving an interest to a person while he shall remain solvent and then over, and giving it for life. If there be a limitation over in the event of insolvency or bankruptcy, then neither the person so becoming bankrupt or insolvent, nor his assignees, can take any benefit beyond the terms of the gift. In the case which arose upon Lord Foley's will (b), it was argued, and I thought admitted, that if the estate went to the sons as property in them, all the consequences must attach. In regard to property given to the separate use of

(a) 18 Ves. 429; 1 Rose, 197.

(b) 1 Br. C. C. 274; 6 Ves. 331.

married women, the directions originally were, that the money was to be paid into their proper hands, and their receipts alone to be a discharge. It was held that a married woman might dispose of property so given to her, and that her assignee might take it, as this court would compel her to give her own receipt in affirmance of her contract. It was not before Miss Watson's case, that these words, 'not to be paid by anticipation,' &c. were introduced. I believe they were Lord Thurlow's own words, with whom I had much conversation upon it. His reasoning was this. I do not hereby take away any of the incidents of property at law; this interest which a married woman is suffered to take is a creature of equity, and equity may modify the power of alienation. But it is quite different if the power is for life. Supposing that the bankrupt makes out that he never has an interest till he attends personally; the act of his receipt being absolutely necessary, yet, if he was never to attend or to give that receipt, and arrears were to accumulate, it is clear that those arrears would be assets for his debts. It is not enough that the testator has said, the fund shall not be transferred; in order to prevent that, it must be given over to somebody else. Unless, therefore, by implication it falls into the residue, it is an equitable interest to which the assignees are entitled."

No tribute can be too great that is paid to the technical or professional reputation of this great judge; but it must be said, that on this, as on some other occasions, he failed in that comprehensive wisdom, which is of greater value in the judicial character than even legal erudition and acuteness. A court of equity has nothing to do with the "legal" incidents of property; the very essence of its jurisdiction in matters of trust consists in disregarding those incidents;—in treating one person who has the legal indicia of ownership—possession, or legal title—as not the owner; and another as the owner, who has no possession or legal title at all. So in the case of equitable waste. The interference of courts of equity with the legal incidents of property is bounded only by their own discretion or by the legislature. A judge in equity recognizes no principles whatever but such as have been created or recognized by his predecessors, or such as, upon the arising of a new case, he may think proper—having regard to the nature and object of his office—to recognize. This expression, however, of Lord Eldon, that equity cannot deprive property of its legal incidents, has led the courts to erroneous conclusions, which it has required all the firmness of one judge now on the bench, and all the candour of another, to correct.

(1.) The general doctrine of courts of equity with respect to gifts of separate estate seems to have sprung out of contracts made upon marriages, by which the husband agreed to allow the wife to enjoy property free from his control; (c) but the efficacy of limitations to a wife's separate use, made without the husband's concurrence, was very early established. In *Doyley v. Perfull* (d), where a wife had assigned a term of years in trust for herself before marriage, and the husband, without the junction of the trustees, had mortgaged the term, Lord Keeper Finch dismissed the mortgagee's bill for foreclosure, after the death of the husband. "For since Queen Elizabeth's time it hath been the constant practice of the Court to set aside and frustrate all incumbrances and acts of the husband upon the trust in the wife's term, and that he shall neither charge nor grant it away. And it is the common way of providing for the jointure of women to convey it in trust for them upon marriage, that it may be out of the power and reach of the husband. Neither shall he forfeit it for outlawry or felony, if, for jointure or in pursuance of articles of marriage, or being the wife's term, it is assigned before in trust, as here, or if on other good consideration it be assigned." This case is generally classed with those which relate to a wife's equity to a settlement; but it will be found, on examining the earlier cases, that the expression "separate estate" is of modern introduction, and expresses what was frequently understood when a *trust*, simply, for a married woman, was spoken of. Thus *Sir Edward Turner's case*, in 1 Vernon, 7, is a short memorandum that it was adjudged in an appeal in the House of Lords "that a term being assigned in trust for a feme by her former husband, and she afterwards intermarrying with the late Lord C. B. Turner, who aliened the term, that the same was well passed away, and that the husband might dispose thereof; and my Lord Chancellor's decree was therefore reversed. But it was agreed that where a term is assigned in trust for a feme *by the privity and consent of her husband*, then without doubt the husband cannot intermeddle or dispose of it." That this was understood to be a case of separate estate is evident from the two subsequent cases of *Pitt v. Hunt* (e) and *Tudor v. Samyne* (f). The question in the former cases is stated to have been, whether a term assigned in trust for the feme before marriage, without the knowledge of the intended husband, could be disposed of by the husband. It does not appear that any case of

(c) *Pitts v. Lee*, 4 Vin. 13.

(d) 1 Ch. Ca. 225. See *Attorney-General v. Sands*, Hardr. 496; *Bullock*

*v. Knight*, 1 Ch. Ca. 266.

(e) 1 Vern. 18; 2 Ch. Ca. 73, S. C.

(f) 2 Vern. 270.

fraud was made out (f). Lord Nottingham, with great reluctance, followed the authority of *Turner's case*, saying that there must not be one sort of equity above stairs in the House of Lords, and another below stairs in Chancery; and he thought that from henceforth it would not serve the turn to have the husband's consent or privity to an assignment of a term in trust for the feme before marriage, unless he was likewise made a party to the assignment. From the report in 2 Ch. Ca. 73, it appears, that the assignment by the wife was in trust "to be at her disposal," words which, it is settled, create a separate estate. The decree was made in favour of purchasers from an execution creditor of the husband, who had forsaken his wife. In *Tudor v. Samyne*, the claim was made by a mortgagee from the husband of a term which had been assigned by a former husband expressly in trust for the separate use and benefit of the wife, and *Turner's case*, being cited as applicable, was followed. It appears that an application for a provision for the wife was unsuccessful. These cases, if they are considered as authorities merely against a wife's equity to a settlement out of chattels real held in trust for her, are overruled by the case of *Sturges v. Champneys*, stated *infra*, p. 63; but from what has been said, they appear more properly to belong to that class of cases on separate estate, which have been overruled in *Tullett v. Armstrong*. In connection with these cases, the modern case of *Donne v. Hart* (g) may be mentioned, before quitting this part of the subject, in which Sir J. Leach held, "that it was clear that the wife's contingent legal interest in a term might be sold by the husband, and there was no difference in equity between the legal interest in, and the trust of, a term." After *Stiffe v. Everitt* and *Sturges v. Champneys* it would be difficult to support this decision. The ground suggested by Lord Alvanley (h), for the right of the husband's assignee, that the trust of a term may be taken in execution, is obviously untenable, it being well settled that such an interest is not within the 10th section of the Statute of Frauds (i), and therefore not within the 11th section of the 1 & 2 Vict. c. 110, which, as far as it relates to trusts, is in the same words.

(2.) It was at one time supposed, notwithstanding the maxim that equity never fails for want of a trustee, that a trust for separate use could not take effect without the intervention of a third person as a trustee; *Harvey v. Harvey* (k); *Burton v. Pierpoint* (l); but

(f) See *Draper's Case*, Freem. 29.

(g) 2 Russ. & Myl. 360.

(h) In *Franco v. Franco*, 4 Ves. 528.

(i) *Lyster v. Dolland*, 3 B. C. C. 478; 1 Ves. jun. 431; *Scott v. Scholey*,

8 East, 467; *Metcalf v. Scholey*, 2 Bos. & Pull. 461; see 1 Crompt. & Mees. 455.

(k) 1 P. W. 125.

(l) 2 P. W. 79.

the contrary has been repeatedly decided in the several cases of a devise of lands in fee simple to a wife (*m*), a devise of a rent-charge (*n*), a bequest of leaseholds (*o*), a bequest of a bond or mortgage (*p*), or of a legacy (*q*). When the gift was to the husband for the *livelihood* of the wife, he was held to be a trustee for her separate use; *Darley v. Darley* (*r*); see *Tyrrell v. Hope* (*s*); so where the husband had taken a transfer of stock bequeathed to his wife's separate use, *Rich v. Cockell*, *Rich v. Hull* (*t*). Of course the provision is liable to failure as against purchasers, wherever, from the circumstances of the case, the husband can dispose of the property, without giving notice of the trust (*u*).

(3.) As to the words which are sufficient to create a separate use, the right of the husband has been held to be restrained in the following cases. A gift to him for the *livelihood* of his wife, *Darley v. Darley* (*v*). An antenuptial agreement by the husband that the wife should *enjoy and receive* the issues and profits of an estate, *Tyrrell v. Hope* (*x*). A similar agreement that the husband should have a part and the wife dispose of all the rest of her estates (which was held to extend to property which fell to the wife after the marriage), *Pitts v. Lee* (*y*). A legacy to a married woman, "her receipt to be a sufficient discharge to the executors," *Lee v. Prieaux* (*z*). A bequest of bonds and a mortgage to a married woman, "to be delivered up to her whenever she should demand or require the same," *Dixon v. Olmius* (*a*). A bequest in trust to pay the annual produce "into the proper hands" of a married woman, *Hartley v. Hurle* (*b*). So the words, "for her own use and at her own disposal," *Prichard v. Ames* (*c*), *Kirk v. Paulin* (*d*). *Davy v. Chute* (*e*) turned on the wife's right to an account after acquiescence. So "for her sole use and benefit," — *v. Lyne* (*f*), *Exp. Ray* (*g*), *Adamson v. Armitage* (*h*); "To A. and L. for

(*m*) *Bennett v. Davis*, 2 P. W. 316;  
*Stead v. Nelson*, *infra*, p. 51.

(*n*) *Major v. Lansley*, 2 Russ. & M. 355.

(*o*) *Parker v. Brooke*, 9 Ves. 583;  
*Anderson v. Anderson*, 2 Myl. & K. 427.

(*p*) *Rolfe v. Budder*, Bunb. 187;  
*Dixon v. Olmius*, 2 Cox. 414.

(*q*) *Lee v. Prieaux*, 3 B. C. C. 381;  
*Prichard v. Ames*, Turn. & K. 222;

— *v. Lyne*, 1 Younge, 562; *Newlands v. Holmes*, *infra*, p. 54, where the woman was unmarried when the gift took effect.

(*r*) 3 Atk. 399, said by Lord Alvanley, in *Lee v. Prieaux*, 3 B. C. C. 381, to be an incorrect report.

(*s*) 2 Atk. 562.

(*t*) 9 Ves. 369; see also *Davison v. Atkinson*, 5 T. R. 434.

(*u*) See 9 Ves. 583.

(*v*) 3 Atk. 399; see note (*r*) *supra*.

(*x*) 2 Atk. 558.

(*y*) 4 Vin. Ab. 131, pl. 8.

(*z*) 3 B. C. C. 381.

(*a*) 2 Cox, 414.

(*b*) 5 Ves. 545.

(*c*) Turn. & R. 222.

(*d*) 7 Vin. Ab. 95.

(*e*) 1 Ch. Ca. 21.

(*f*) Younge, 562.

(*g*) 1 Mad. 199.

(*h*) 19 Ves. 416, G. Coop. 283.

their own use and benefit, independently of any other person, *Margetts v. Barringer* (i). In an old case in Vernon it is said that a wife agreed to sell her inheritance, so that she might have a part of the money. The land was sold and her part of the money put into the hands of trustees; and it was held that it should not be liable for the husband's debts, nor should any promise by the wife subsequent to the first agreement bind her (k). It seems that if the husband deserts the wife and she acquires property "to subsist herself and family," that is free from his control, *Cecil v. Juxon* (l); and where the husband was attainted of felony, and pardoned on condition of transportation, money to which the wife became entitled, as orphan of a freeman of London, belonged to her as separate estate, *Newson v. Bowyer* (m). It may be observed that where stock is given to trustees in trust to pay the dividends to a married woman for her separate use, and there is no limitation of a life interest, an absolute interest in the capital passes, which she can dispose of as a feme sole; *Elton v. Shepherd* (n), *Haig v. Swiney* (o).

On the other hand, the marital rights have been upheld where the words were merely, "to and for her own separate use and benefit (p), and where, after a bequest to trustees for a married woman's sole and separate use, the residue was bequeathed to her for her use and benefit, the latter gift was held not to constitute separate use (q). Where a gift is made to a husband in trust for his wife, it should seem that that implies a trust for her separate use; but where the husband was associated with another trustee for other purposes, a bequest to them in trust for the wife for her life, and after her death for the benefit of her children, was held not to raise the same inference (r). Where the proceeds of the sale of land were directed to be distributed among all the settlor's children by name, and the shares of two, who were married women, were to be paid "into their own proper and respective hands, to and for their own use and benefit," but in case they should be dead, to their respective husbands for their own use and benefit; those shares were held not to be separate estate (s). In another case an attempt was made to evade the doctrine of *Brandon v. Robinson* by devising lands to trustees in trust to pay the rents and profits to the husband

(i) 7 Sim. 482.

(k) *Rutland v. Molineux*, 2 Vern. 65.

(l) 1 Atk. 278.

(m) 3 P.W. 37; see *Portland v. Producers*, 2 Vern. 104; *Attorney General v. Mullan*, 4 Russ. 329.

(n) 1 B. C. C. 532.

(o) 1 Sim. & St. 487.

(p) *Roberts v. Spicer*, 5 Mad. 491; *Johnes v. Lockhart*, 3 B. C. C. 383, Belt's ed.; 5 Ver. 520, n.; *Kensington v. Dollond*, 2 Myl. & K. 184; see *Lumb v. Milnes*, 5 Ves. 517.

(q) *Wills v. Sayer*, 4 Mad. 409.

(r) *Exp. Beilby*, 1 Gl. & Ja. 167.

(s) *Tyler v. Lake*, 2 Russ. & M. 183.

for life ; but if he should attempt to assign the same, or become bankrupt or insolvent, then upon trust to pay thereout an annuity of 100*l.* to the wife during her husband's life, and after his decease an annuity of 30*l.* during her widowhood ; but it was held that the annuity of 100*l.* was bound by the husband's assignment for value (*t*). In *Massey v. Parker* (*u*), a bequest, (by a very informal will,) to two unmarried grand-daughters, of the interest of all monies not otherwise bequeathed, "the said interest to be for and under the sole control of my two said grand-daughters ; the principal to be equally divided for the use of the surviving issue ; *but if either* ; and that their mother shall have no control whatever over this their property ; and at their demise the principal to be equally divided for the use of their surviving issue," was held not to give one of the grand-daughters a separate estate against the assignees in insolvency of an after taken husband : the words "sole control" being construed to have been meant only to exclude the control of the mother. The other point in the case, that, had the words implied a separate estate, they would have been inoperative, because the grand-daughter was single when the gift took effect, will be noticed presently.

(4.) There are three cases in which, upon the construction of the terms of the gift, and independently of the doctrine of *Massey v. Parker*, the operation of a trust for separate use has been confined to a particular coverture. In *Knight v. Knight* (*x*), by a marriage settlement a personal fund was assigned to trustees, in trust to receive the income *during the life* of the lady, and pay the same to her for her separate use, or as she should appoint, *notwithstanding her coverture*, but not by anticipation ; with a declaration that the said income should not be subject to the control, &c. of *R. G.*, her intended husband ; and after her decease, in case he should survive her, in trust, to permit him to receive the income for life, and after the decease of the survivor in trust for all the children of the lady *by R. G.*, or any future husband after his decease. The Vice-Chancellor decided on the construction of the instrument that the separate trust did not extend to a second marriage. The circumstances and decision were the same in *Bradley v. Hughes* (*y*), although there the Vice-Chancellor appears to have rested his judgment on the supposed invalidity of a separate trust, in respect of future coverture. In *Benson v. Benson* (*z*), the same construction was made in a bequest of the interest of a fund for the separate use of the testator's "daughter Jane Lane, the wife of John Lane, for her

(*t*) *Stanton v. Hall*, 2 Russ. & Mylne,  
175.  
(*u*) 2 Myl. & K. 174.

(*x*) 6 Sim. 121.  
(*y*) 8 Sim. 149.  
(*z*) 6 Sim. 126.

life, free from the control of her husband, and for which her receipt alone, or the receipts of such persons as she shall alone from time to time appoint, to be a sufficient discharge." There were expressions in subsequent parts of the will upon which the Vice-Chancellor relied in confirmation of his construction; which, indeed, would otherwise have been difficult to reconcile with a previous case at law, *Beable v. Dodd* (a), where there was a devise of lands in trust to pay the rents and profits in trust to the testator's daughter, Alice Fowler (whose husband was then living), notwithstanding her coverture, and not to be subject to the control of her husband, nor liable to any debts *which he had or should contract*. Afterwards the testator made a codicil, taking notice of the death of his daughter's husband, wherein he confirmed in general terms all the gifts, &c. in his will. It was held that the separate trust extended to a subsequent coverture. More weight appears to have been attributed to the circumstance of the subsequent confirmation of the will than it was perhaps entitled to.

(5.) The decisions respecting the *validity* of trusts for separate use with reference to future coverture, will be found fully stated and discussed in the arguments and judgments in the cases which are reported *infra*.

(6.) The effect of a trust for separate use is not merely to exclude the marital control, but to give the wife all the powers of disposition by deed or will over her separate estate and her savings out of it, which she would have if she were single (b). But the power which a wife has over her separate estate in possession does not enable her, even by consent in court, to dispose of a *reversionary* interest in the same fund (c).

A wife's express engagements are, generally speaking, binding on her separate estate, although not referred to in them, as where she gives a bond or note either as principal or surety, covenants to pay an annuity, &c. (d), and the circumstance that there

(a) 1 T. R. 193.

(b) *Herbert v. Herbert*, Pre. Ch. 44; *Sawyer v. Bletsow*, 1 Vern. 244, 2 id. 328; *Pridgeon v. Pridgeon*, 1 Ch. Ca. 117; *Gage v. Lister*, 2 B. P. C. 4; *Grigby v. Cor*, 1 Ves. sen. 518; *Sturgis v. Corp*, 13 Ves. 192; 3 Mad. 385; *Gullan v. Trimby*, 2 J. & W. 457; *Stinson v. Ashley*, 5 Russ. 4; *Owden v. Campbell*, 8 Sim. 551; *Stead v. Nelson*, *infra*, p. 53.

(c) *Ritchie v. Broadbent*, 2 Juc. & W. 456; see *Purdew v. Jackson*, 1 Russ. 1; *Honner v. Morton*, 3 Russ. 87; *Lach-*

*ton v. Adams*, 14 Law J. 382; *Thrupp v. Harman*, 3 Myl. & K. 513; *Stiffe v. Everitt*, 1 Myl. & Cr. 27.

(d) *Norton v. Turvill*, 2 P. W. 144; *Hulme v. Tennant*, 1 B. C. C. 16; *Biscoe v. Kennedy*, ib. 17, n.; *Wagstaffe v. Smith*, 9 Ves. 521; *Jones v. Harris*, 9 Ves. 486; *Heatley v. Thomas*, 15 Ves. 596; *Bullpin v. Clarke*, 17 Ves. 365; *Stuart v. Kirkwall*, 3 Madd. 389; *Field v. Sowle*, 4 Russ. 112; *Nail v. Punter*, 5 Sim. 562; *Dowling v. Maguire*, 1 Cas. tem. Plunk. 1.

is no trustee makes no difference (*e*). But her separate property is not bound by debts contracted by her, unless, by an express promise to pay, she assumes a personal liability, or unless, by reason of her living apart from her husband, such a promise must be implied (*f*). So it seems that a demand which arises by implication, as on breach of contract to sell, or in respect of fraud, or on the principle that they who seek equity must do it, is not enforceable against separate estate during the wife's life (*g*). In the three last of the cases cited in the note, annuities granted by married women failing from defective registry, it was held that the consideration money could not be recovered against their separate estate. In the last case it was also held that where the husband's property and the wife's were pledged together as a security for the husband's debts, and the husband became insolvent, his property was first applicable. But separate property which has been fraudulently obtained may be followed (*h*). Separate estate is of course assets for the payment of debts after her death, in the administration of which, specialty and simple contract creditors, and legatees, share *pari passu* (*i*).

The position that a wife is considered as if she were a feme sole in respect of her separate property, does not in terms apply to gifts to her husband; and in *Milnes v. Busk* (*k*), Lord Rosslyn said, that such gifts would not be established without the presence of the wife in court. But it seems that this is not now necessary (*l*). As to her claim for arrears of pin-money, see *Howard v. Digby* (*m*).

(7.) The restraint upon alienation does not arise with the same facility of inference from the language of the gift, as the separate trust. A direction to pay the interest from time to time into the proper hands of the wife, or "into the hands of the wife, and not otherwise," is not sufficient (*n*). And a superadded declaration, that the wife's receipts alone shall be good discharges, is

(*e*) *Major v. Lansley*, 2 R. & M. 355.

(*f*) *Murray v. Barlee*, 4 Sim. 82; 3 Myl. & K. 209; *Nantes v. Corroock*, 9 Ves. 182; see 2 Dick. 562; 2 Sch. & Lef. 264.

(*g*) *Aylett v. Ashton*, 1 Myl. & C. 105; *Greatley v. Noble*, 3 Mad. 79; *Duke of Bolton v. Williams*, 2 Ves. jun. 145; *Jones v. Harris*, 9 Ves. 486; *Aguilar v. Aguilar*, 5 Mad. 414.

(*h*) *Greatley v. Noble*, 3 Mad. 79.

(*i*) *Anon.* 18 Ves. 258; *Gregory v. Lockyer*, 6 Mad. 90; *Court v. Jeffery*,

1 S. & S. 106. As to funeral expenses see *Bertie v. Chesterfield*, 9 Mod. 31.

(*k*) 2 Ves. jun. 488.

(*l*) See 2 Vern. 65, *ante*, p. 12, n. (*k*); 2 Ves. sen. 669; 5 Ves. 17, n. 694, n.; 8 Ves. 182; 9 Ves. 369; 13 Ves. 192; 1 Mad. 516; 3 Mad. 385.

(*m*) 6 Bligh, 224.

(*n*) *Clarke v. Pictou*, 3 B. C. C. 568; *Pybus v. Smith*, 1 Ves. jun. 189; *Parkes v. White*, 11 Ves. 222; *Brown v. Like*, 14 Ves. 302; *Acton v. White*, 1 Sim. & St. 429.

equally ineffectual (o). In *Barrymore v. Ellis* (p), by a marriage settlement, Lady Barrymore assigned an annuity to which she was entitled to trustees, in trust, during the joint lives of herself and her intended husband, to pay the same to such persons as she should by any writing, signed by her, notwithstanding her coverture, appoint, but not so as to deprive herself of the benefit thereof by sale or other anticipation; and, for want of such direction or appointment, to pay the same to her, for her own sole and separate use. There was some doubt as to whether the settlement was actually made at the date which it bore, but waiving that point, it was decided that a subsequent assignment by Lady Barrymore and her husband was valid, the limitation being construed, disjunctively, as a grant to such persons as she should appoint in a particular way (namely, without anticipation), and in default of such appointment, to her for her separate use, without any fetter. This construction is certainly very subtle, and very unnecessarily exalts what was meant to be only a description of the person to give receipts, into an independent limitation of a power of appointment.

That the restraint upon anticipation does not operate during discovery was decided in the cases of *Woodmeston v. Walker, Jones v. Salter*, and *Brown v. Pocock* (q). The history of the doubts which arose as to the validity of such a restriction in respect of future coverture will be found in Mr. Hayes's learned and ingenious dissertation (r), and in the arguments and judgments in *Scarborough v. Borman* and *Tullett v. Armstrong*, *infra*. The general result of these last cases, taken in connexion with the earlier decisions, is,—

First, that a declaration, accompanying a gift of property, real or personal, for the benefit of a woman, that such property shall be held for her separate use, will take effect whenever and so often as she becomes coverte, unless the declaration refers to a particular coverture only.

Secondly, a general declaration, that property given for a wife's separate use shall not be alienable by way of anticipation, although not in terms confined to the state of coverture, takes effect whenever she becomes coverte, subject to any disposition she may have previously made (otherwise than by the act of marriage) during discovery.

(o) *Acton v. White*, 1 S. & S. 429;  
*Brandon v. Robinson*, 18 Ves. 429; *Glyn*  
*v. Buster*, 1 You. & J. 329.

(p) 8 Sim. 1.  
 (q) 2 Russell & Mylne 197, 208, 210.  
 (r) Introd. to Conv., p. 389, 4th ed.

## SCARBOROUGH v. BORMAN.

COURT OF CHANCERY, H. T. 1840.

*A Testator bequeathed a Sum in Trust for his Daughter, then and at his Death a Widow, for her separate Use. After the Death of the Testator she married :—Held, that her Husband acquired no Interest in the Fund.*

By the will of Thomas Smith, made in 1820, trustees (of whom the defendant was the survivor) were directed to pay, during the life of his daughter, Frances Brown, a widow, the interest of 1500*l.*, “ when and as the same should arise, into her own hands for her sole, separate, and exclusive use and benefit, and exclusive of, and without being in anywise subject or liable to the debts, intermeddling, or control of any future husband ; and he declared it to be his will that the receipt of his daughter, notwithstanding any future coverture, should be a good and sufficient discharge for the interest.” The testator died in 1820, and in 1832 Frances Brown married the plaintiff Mr. Scarborough, who filed this bill, to be declared entitled in right of his wife to the interest of the 1500*l.* during her life. The question was, whether the wife was entitled to her separate use, the fund having become vested in her when single. The Master of the Rolls having given judgment in the case of *Tullett v. Armstrong*, decided that she was ; from which decision the cause now came on upon appeal.

Mr. *Wigram* for the appellants.—The point in question is as to the right of the wife, taking property to her separate use when she was discovert, upon marriage to hold it against her husband. There is no difference in principle between a life interest being given and the fund itself. The principle upon

which *Massey v. Parker* (a) was decided was, that if a person, whether male or female, has an interest in property, any restraint which prevents the property being attended with its necessary incidents, is inconsistent with that interest. There are two kinds of cases: one in which the property was given to a woman to her separate use, with a clause against anticipation; and the other, where property is given to her separate use without that clause. To the first belong *Barton v. Briscoe* (b), *Jones v. Salter* (c), *Woodmeston v. Walker* (d), *Newton v. Reid* (e), *Brown v. Pocock* (f). Of the second kind is *Massey v. Parker*. To the former is opposed *Tullett v. Armstrong* (g),—to the latter, *Davies v. Thornycroft* (h). The wife's disposition of her interest cannot be restrained without reversing the former cases entirely. To hold that it is within the wife's power to dispose of her separate estate is to enlarge and not to alter her power, and must have been within the intention of the donor; though it may be different where the testator adds a clause against anticipation. Any deviation from the doctrine laid down in *Massey v. Parker* will unsettle the previous decisions, which depend upon the answer to this question:—Is the restraint imposed upon the property by the donor consistent with the rules of law? Alienation is an incident inseparable from absolute property, and the cases decided by Lord Brougham in support of this principle must be considered to have been reversed by the Master of the Rolls in the present case. It is a mistake to say that the decision in *Massey v. Parker* had the effect of breaking in upon the protection which the law was supposed to give to married women in the enjoyment of their separate property; for it is manifest that a donor, by adding the fetter against anticipation, or the donee herself, by a settlement, may always protect the property; so that the court is asked to reverse its own decision for the sake of putting a fetter upon the property, when the parties themselves may do it independently of the Court. The Vice-Chancellor said in *Davies v. Thornycroft*, that he always understood that it was lawful to give

(a) 2 Myl. &amp; K. 174.

(b) Jac. 603.

(c) 2 Russ. &amp; Myl. 208.

(d) 2 Russ. &amp; Myl. 197.

(e) 4 Sim. 141.

(f) 2 Russ. &amp; Myl. 210.

(g) 1 Kee. 426; 2 Jurist, 912.

(h) 6 Sim. 420.

property to the separate use of a woman, married or unmarried, and the practice of the profession had been according to that opinion without any variation for more than a hundred years. That may be true, but the way conveyancers do it is by giving the property to a female until she marries, and then subjecting it to a settlement, or by the intervention of trustees, and sometimes with a gift over in case of alienation. These precautions form a sufficient security; and the question for the court is, whether, if the parties do not take these precautions, it is to do so for them, and secure property to a woman without its legal incidents. It will be asked, whether the words added to this gift are to have no effect at all. There is no occasion to hold that they have no effect; because, if the woman continues under coverture to her death, the words are operative. Suppose a testator gives property to a woman who is an infant, and marries, and that she has no power to dispose of the property until she attains twenty-one or marries, and the testator provides, that if she marries before twenty-one, the property shall be held to her separate use; that would be a good direction for the court to carry into effect, because the woman had not the power before marriage to dispose of the property. The law does not allow illegal conditions to be annexed to property (i). *Brandon v. Robinson* (k) is a stronger case. There it was decided, that if a person gives property to one until he becomes bankrupt, and, upon his bankruptcy, to trustees for his use, the gift fails, as he still has the interest. The cases where there is the clause against anticipation in the case of a woman are stronger. In *Barton v. Briscoe*, which was the first case that called for a decision, Sir Thomas Plumer says, "We know that a clause against anticipation in the case of a male is inoperative." The next cases are *Jones v. Salter*, *Woodmeston v. Walker*, and *Brown v. Pocock* (l). *Davies v. Thornycroft* (m), decided by the Vice-Chancellor in opposition to *Massey v. Parker*, was the first case in which any doubt was thrown upon the position, that property given for the separate use of

(i) See *Ross v. Ross*, Jacob & Walk. 151; *Bradley v. Peizoto*, 3 Ves. 323; and *Willis v. Hicox*, L. C., January, 1839.

(k) 18 Ves. 429.

(l) Consecutively reported in 2 Russ. & Myl. 195, 208, 210.

(m) 6 Sim. 424.

a woman not under coverture, was at her absolute disposal. On the hearing of *Davies v. Thornycroft*, the Vice-Chancellor was pressed with the argument that it was a fetter; on the other side, it was said that it enlarged her power. It is a fetter because it disallows her use of it except in a particular mode. Now it is admitted, that before the marriage, or during widowhood, she may alienate; and then, why is not the act of marriage to give it to the husband? The effect would otherwise be that a particular act would not produce its legal effect. It is therefore a fetter, because it withdraws the property from a settled rule of law that restrictions on alienation shall not prevail. It is as if it were said, that a legal release or conveyance of the property by a woman not under coverture is not valid. The first case adverse to *Massey v. Parker*, expressing Lord Eldon's opinion, is *Anderson v. Anderson* (n); but the circumstances were such that the court would now decide as Lord Eldon did; there the husband admitted a contract for a qualified restraint. The authority of *Anderson v. Anderson* does not go one step beyond *Woodmeston v. Walker*. The next case is *Newton v. Reid* (o), and it is surprising that the same judge who decided this should have come to the conclusion he did in *Davies v. Thornycroft*, when he held that a trust for the separate use of a woman, whether single or married, is valid. This was followed by *Johnson v. Freeth* (p), and *Benson v. Benson* (q), decided by the same judge, who held, that although the fund was given to the separate use for life of the woman whose first husband had died, and who had married again, yet that the trust for her separate use ceased on the death of her first husband. The court has now an opportunity of making the decisions consistent with principle.

Mr. Jemmett, with Mr. Wigram.

Mr. Tinney for the respondents.—The ancient law of husband and wife has been much modified by equity, as in the cases of separate estate, and of deeds of separation. By the

(n) 2 M. & K. 427.  
(o) 4 Sim. 141.

(p) 6 Sim. 423.  
(q) 6 Sim. 126.

old law such deeds were considered to be against the policy of marriage—against the ancient principles of the common law (r). As to the separate estate, the old common law—not the act of the parties, but the policy of the law—gave it to the husband. Equity is a living system, capable of accommodating itself to the wants of mankind as they arise. It found the rules of law mischievous and inconvenient; it decided that there was such a thing as separate estate, and having so decided, it became the understood doctrine of the courts of equity, which courts of law have respected. We are not now to go back to first principles. There are many rules of law that are not to be reconciled with principle: for instance, that a fine should destroy an estate tail, and not estates limited in remainder. With respect to separate estates, it was first held that it was necessary it should be vested in trustees; next, if there was no trustee, that the husband should be considered as trustee for the wife (s). The next thing to protecting the wife against the independent acts of the husband, was holding it to be necessary to protect her against his secret influence, and that was attained by Lord Thurlow in *Miss Watson's settlement* (t), of which he was a trustee. When we look into *Brandon v. Robinson*, and *Barton v. Briscoe*, there is something to be found as to such a restriction being against the policy of the law. But the question is, whether the provision for separate estate is not introduced with respect to future covertures, and not merely to the present coverture; and it may be, that during discovery it shall be void, and if the woman is married, that it shall be void when that ceases, and revive upon a new coverture. The introduction of the restraint upon anticipation was known to Lord Eldon; *Jackson v. Hobhouse* (u). He there enters into the history of separate use, which was first sanctioned by Lord Alvanley, in *Wray v. Sockett* (x). Supposing the law to be understood, as I now state it, at the time it was introduced and perfected, and that it extended to future coverture, it is not extraordinary that there was no decisions, because

(r) See *Rodney v. Chambers*, 2 East, 283.

(s) *Harvey v. Harvey*, 1 P. Wms. 125; *Bennett v. Davis*, 2 P. Wms. 316.

(t) See *Brandon v. Robinson*, 18 Ves. 429.

(u) 2 Mer. 483.

(x) 4 Bro. 483.

decisions are wanted only in cases of doubt. Another test of the existence of the doctrine in this form is the practice of mankind, and the usage of that part of the profession of the law which embodies it in deeds of settlement. Horsman's Precedents (3rd edit. vol. 1, p. 29, and vol. 2, pp. 836, 1122, 1131), and Wood's Conveyancing (vol. 3, pp. 459, 821, 822), contain gifts to separate use, which have continued to be familiar to the profession and without doubt, until the very recent decisions which have unsettled the law upon this subject. In *Davies v. Thornycroft*, the Vice-Chancellor stated, that, within his knowledge, Lord Eldon had supported the clause. One authority for this is *Strathmore v. Bowes* (y). Lord Thurlow speaks of it as law admitting of no doubt: "Suppose a relation had given 10,000*l.* for the sole and separate use of a woman; if she had represented it as her own absolutely, so that upon a marriage it would have gone to her husband, this court would have compelled the trustees to give it to the husband, but not otherwise." Nothing can be stronger than this; he puts this proposition to assist him in the construction of the more difficult part of the case. In *Beable v. Dodd* (z), testimony is borne to the existence of this doctrine in equity, and that it was recognized in courts of law:—that was a decision upon replevin, depending upon the opinion of the court as to the validity of a gift to separate use. The next case of the same kind is *Clayton v. Gresham* (a). The next case, *Anderson v. Anderson* (b), depends entirely upon the operation of the will as to future coverture, and it decided that a gift to a woman, single at the time of the gift, to her separate use, should be effectual upon a future coverture. In ——— v. *Lyne* (c), Lord Lyndhurst held that a limitation to the separate use of the testator's widow was good. *Simson v. Jones* (d) is a further authority on the same side. [Lord Chancellor.—The circumstance of Sir J. Leach having held, in the case of *Woodmeston v. Walker*, a different opinion from that which was established by Lord Brougham, in his decision of that case, very much weakens

(y) 1 Ves. jun. 27.

(z) 1 Term Rep. 193.

(a) 10 Ves. 288.

(b) 3 M. &amp; K. 427.

(c) Young, 562.

(d) 2 Russ. &amp; Myl. 365.

the authority of *Simson v. Jones*.] There is but one decision against a gift being good for the future coverture, which is *Massey v. Parker* (e), and it is necessary to consider how doubts, difficulties, and uncertainties have crept into this branch of the law. The first case which lent its tendency this way was *Brandon v. Robinson* (f), which was an attempt to give the same protection to a man against his creditors as to a woman against her husband. In that case Lord Eldon states the distinction between an inalienable gift to a man and a gift to a woman's separate use; and there is not the least pretence for contending that Lord Eldon was there confining himself to a case where a woman was actually married; see *Foley v. Burnell* (g). *Jones v. Salter* (h) is a decision of Sir Wm. Grant's, in which the income being bequeathed to a married woman for her separate use, without power of anticipation, free from the control of her then present or any future husband, and her husband dying, she and the reversioner of the fund petitioned for a transfer, which was ordered. But it is expressly admitted that these trusts do not prevent a woman from alienating when single. *Barton v. Briscoe* (i) does not go further than *Jones v. Salter*. A woman when single being sui juris, she can dispense with the protection, which was meant for her benefit and not for her injury. A limitation, therefore, of this kind restrains no act when separate. This was succeeded by *Newton v. Reid* (j), in which the Vice-Chancellor pronounced that "there being no gift over upon alienation, the restrictions are void." But in subsequent decrees the Vice-Chancellor declared that he merely followed *Barton v. Briscoe*, and that he had not the least notion that separate estate might not arise upon a future coverture; though not a restraint upon alienation. Much weight ought not to be given to this decision, considering the subsequent explanations the Vice-Chancellor has made respecting it. It is a hasty decision upon a case not argued.

Jan. 22, Mr. Tinney resumed his argument.—Woodmeston

(e) 2 Myl. & Kee. 174.

(f) 18 Ves. 429.

(g) 1 Bro. 274.

(h) 2 Russ. & Myl. 208.

(i) Jacob, 603.

(j) 4 Sim. 141.

v. *Walker* is the case of a single woman; but the observations of Lord Brougham certainly apply to the case of an alienation during marriage. Marriage is not an alienation of property personal or real. The civil relation gives certain powers to the husband, and imposes a control upon his part. The law holds that the husband and wife are seised in right of the wife—if they are not received, arrears upon the husband's death survive to the wife. The property is not taken away from the wife as to personal chattels either in manual possession or in action. The chairs and tables are as much in the possession of the husband as the wife, and no assignment is necessary for them—they pass from hand to hand. Now as to property held by title: The law gives the husband the right to sue, and if he turns it into possession there is no doubt it passes into possession. If he sue in right of himself and wife, the judgment survives to the wife; and if he sues for it in his own name and dies, and does not get judgment, it still survives to his wife. Courts of equity will protect the wife's survivorship. If the husband becomes bankrupt or insolvent, the court will protect the wife's right of survivorship. There may be some doubt as to assignments for valuable consideration. It is said, if she can alienate the day before by deed, why not the day after by marriage? Marriage is not an act of alienation, neither is marriage contracted with that intention. Dower attaches upon the property which is afterwards acquired by the husband. In that case it is not alienation, and surely the rights of husband and wife must not be considered on different principles. Marriage is not an act done with reference to the property; and protecting the wife in case of marriage is not a fetter in any reasonable language. It is not necessary that a rule of law should be made to square with every ordinary legal principle. The barring of estates tail by recovery in the court of Common Pleas by default of the common vouchee is not to be accounted for on principles of reason. There may be a legal principle, but it is impossible to discover it. So when the great judges invented separate use to go according to the gift of the donor. *Stare decisis* is a strong principle in expounding the law, and this has been the law till within the last few years. Also com-

*munis error facit jus.* The mark of separate use remains upon the property till an act is done by the wife. The court cannot consider husband and wife as contracting marriage with reference to every right of property. These restraints are created by strangers, by the donors of the property, not by the wife; and it would be a species of fraud to act in contravention to it. [*Lord Chancellor.*—It may be considered an equity attaching upon the husband interfering with his marital rights, and to which he has given his consent, on account whereof he is to leave the property in the same state in which he finds it; on the other hand is to be considered what Lord Thurlow said in *Strathmore v. Bowes*. “That the husband had no notice of it.” But if the anticipation clause is not to stand, the separate use is worth nothing; therefore it will depend very much upon your argument, though no part of your case, whether that is to stand or not.] The court will say to the husband, “I will not hear you say, if you had known it you would have contravened it; you are bound to know it.” The answer may be on the part of the wife, that she would not have married, except after a settlement. The policy of the law is substantial, not in form, and as to what Lord Brougham says about giving it over to trustees to preserve it for successive covertures, with regard to future covertures she is like a man, and it could not be done in *Brandon v. Robinson*. It cannot be effected for maintenance in the case of a man, and the law would not allow it *in consimili casu*. Besides, it is only a dictum. [*Lord Chancellor.*—That is a strong opinion in *Woodmeston v. Walker*, if not a decree.] You can appeal against a judgment, but not against an opinion. The general acquiescence of mankind is only given to a decision. Next came *Brown v. Pocock*, in which the limitation was for life; but in case she should marry it was given to her separate use. Here is the proper mode, if the law would permit it, and it failed. Sir J. Leach considered it a good executory limitation(*k*). *Newton v. Reid* came to be noticed in *Brown v. Pocock*, though not in *Woodmeston v. Walker*. Lord Brougham thought the gift ineffectual, and the decree

(*k*) *Tyler v. Lake*, 2 Rus. & Myl. 187.

was reversed by him. [*Lord Chancellor*.—Lord Brougham recognized *Newton v. Reid*.] The Vice-Chancellor expressly puts his own view of *Newton v. Reid*, in 6 Sim. 631, and we ought to have the benefit of his own explanations. If they are choses in action, he only gets them in right of his wife by administering to her. [*Lord Chancellor*.—All those cases arise upon the husband exercising the right to sue, and the law gives the husband that right.] Then came *Massey v. Parker* (l), which is the only case against us. Mr. Wigram says, an infant marries and cannot give her property. In making that concession Mr. Wigram has given up his case. He feels the necessity of protection for an infant, and I want it for an adult. He says, "The act of marriage, on account of incapacity, shall not be an alienation; but the Court will protect the infant and her separate use. If the Court will do that, it will do more. [*Lord Chancellor*.—We are contending for very little—only for the interval, because the woman can part with it during the interval.] The next case was *Benson v. Benson* (m), in which it was held that the trust for the separate use ceased on the death of the first husband. In *Davies v. Thornycroft* (n), the point in my case came before the Court, and was affirmed by the Lords Commissioners, in July, 1835. *Johnson v. Freeth* affirmed *Newton v. Reid*. In *Johnson v. Johnson* (o), a distinction is attempted to be set up between infants and married women, which is not maintainable. The next things to be considered are the traditions of the law and the practice of conveyancers, which are very valuable, as they show the construction to be put upon decisions. The conveyancers act as a watch upon the decisions. The common forms of conveyancers do not contain an appointment to the wife previous to the separate use. The limitations by Saunders contain nothing of the kind. Upon *Tullett v. Armstrong*, it is contended that *Newton v. Reid* is wrong, and upon *Scarborough v. Borman* that *Massey v. Parker* cannot be supported.

Mr. *Sidebottom*, with Mr. *Tinney*.—The restraint upon an-

(l) 2 M. & K. 174.

(m) 6 Sim. 126.

(n) 6 Sim. 420.

(o) 1 Kee. 648. In *Johnson v. Johnson* the donee was unmarried when the

gift took effect, and married during infancy. If the case is to be governed by marital right, infancy can make no difference.

tipication is of no use when a woman is single, but comes into operation when she marries. It is against the intention of the donor, and therefore unconscientious in the trustee to hand it over to the husband, and also for the husband to receive it; and if so, it is unconscientious as much in respect of the second and third covertures as the first. The Court has broken through three rules of the common law in order to give effect to the intention of the donor; first, that a married woman may assign her separate estate without the assent of her husband; secondly, that she may do so without matter of record; and thirdly, by the restraint against anticipation. In order to effect the intention of the parties, and having broken through so many principles of law, it would be straining at a gnat and swallowing a camel to consider the thing by analogy to principles of law. As to what is said about women having the power to protect themselves—if this is so, how is it that fathers and testators throw this protection around them, except because they are not sufficiently acquainted with the law? (Other cases cited were, *Acton v. White*(p), *Lee v. Prieaux*(q), *Stiffe v. Everitt*(r), *Maundrell v. Maundrell*(s).)

January 24th, 1839.—Upon the close of the arguments in this and the succeeding case of *Tullett v. Armstrong*, the Lord Chancellor observed, that the decisions were in a state in which they could not possibly continue. If these trusts were to continue at all, they must continue for the whole purpose for which they were intended; to take away the restraint upon alienation, and leave the separate estate, would only disappoint the intention of the donor, and leave the object of his bounty in a worse situation than if she had no separate property at all. He would look into the authorities, but what the result might be, he could not say before looking into them. The Vice-Chancellor had, in many cases, upon the joint application of the husband and wife, handed over the property. He could not see how the Vice-Chancellor's view of the law could be supported. He should be anxious to continue it in the state in which the Master of the Rolls had left it; it would be extremely beneficial to do so; but how that could be done

(p) 1 Sim. &amp; Stu. 429.

(q) 3 Bro. 381.

(r) 1 Myl. &amp; K. 37.

(s) 10 Ves. 263.

consistently with the current of authorities, he could not possibly say; and he said that we knew nothing of separate use, except as anticipating a future coverture.

January 22nd, 1840.—The Lord Chancellor having delivered judgment in the following case of *Tullett v. Armstrong*, dismissed the appeal in this case without costs.

---

TULLETT v. ARMSTRONG.

*A Testator gave Property to Trustees, in Trust for his Wife for Life, with Remainder to B., then a Feme Sole, for her Life, to her separate Use, without Power of Anticipation. B. was unmarried at the Death of the Testator, but married in the Lifetime of the Widow: Held, that both the Clause of Separate Use and the Restriction against Alienation became effectual on her Marriage.*

By indenture, of the 20th March, 1832, Armstrong and his wife, in consideration of 300*l.*, granted to Tullett, the plaintiff, an annuity of 31*l.* 17*s.* during the life of his wife, who, by the same indenture, in exercise of the powers, &c. given to her by the wills of Nathaniel and Ann Bradford, appointed to the plaintiff during her (Mrs. Armstrong's) life, upon trusts for securing the annuity, certain copyhold, leasehold, and freehold estates in Brighton, which she enjoyed under the following gifts, viz. (1), by the will of Nathaniel Bradford, who died in 1820, a copyhold messuage and premises devised upon trust as to one-third part thereof for her during her life, "in such manner that she should not anticipate, sell, assign, or dispose of her life estate so devised to her in the said copyhold premises, and the rents and produce thereof, and so and in such manner that neither any husband of her should have or acquire any right in or control over her life estate or interest, nor should the same be liable to the debts, control, forfeiture, or engagements of any such husband; and from and immediately after her decease," then over. (2), An undivided moiety of a copyhold tenement and hereditaments,

and also the entirety of a leasehold coach-house and stable; and also a leasehold garden, devised by the said testator to her, to hold to the use of her and her assigns during her life: the testator declaring it to be his will and intention that the devises and bequests thereinbefore made by him to Mrs. Armstrong (then Mary Augusta Tilt), were so given and devised to her free, exonerated from, and not subject to the rights, control, interference, debts, contracts, and engagements of any husband, and were to be taken and received by her as if she were sole and unmarried, and so to be holden and enjoyed by her. (3), A freehold messuage or tenement, and premises, devised by the will (made on the 25th Aug. 1826) of Ann Bradford, "upon trust, that the trustees should receive and take the rents, issues, and profits thereof, and pay the same unto her (Mrs. Armstrong) during her natural life, so and in such manner that she should not sell or dispose of her life interest therein, or any part thereof, or raise or borrow money thereon by anticipation, mortgage, or otherwise, and so and in such manner that the rents, issues, and profits thereof should not be subject to the right, control, or interference of any husband whom she might marry, nor be liable to his debts, contracts, forfeitures, or engagements; and the said testatrix declared that the receipt of her said niece only should be a good and sufficient discharge to her trustees for the time being for such rents and profits; and that any sale or disposition, for raising money by mortgage or otherwise, of or upon her life interest, should be from time to time null and void; and, from and immediately after her decease, then over," &c. Mrs. Armstrong and her husband were married on the 23rd April, 1827, and the testatrix, Ann Bradford, died some time after in 1827. A deed similar to the former was executed in September, 1832, to secure to the plaintiff a further annuity. Both annuities were regularly paid until December, 1834. In January, 1835, Mr. Armstrong took the benefit of the Insolvent Debtors' Act, and the annuities being unpaid, the plaintiff filed this bill to obtain payment out of the properties devised and bequeathed by the wills of Nathaniel and Anne Bradford.

The answer was filed on the 23rd of May, 1836, and the

plaintiff, on the 27th June, 1836, moved for a receiver of the rents and profits of the estates on which the annuity was charged ; which motion, after argument and consideration, the Master of the Rolls granted as to the estates devised by Nathaniel Bradford, but refused as to the estates devised by Anne Bradford (s). The cause was afterwards heard and fully argued.

Nov. 3, 1838, Lord LANGDALE, M. R., after stating the facts:—In this court, for nearly a century, a married woman has been considered capable of enjoying property to her own use, independently of her husband ; which is called her separate estate ; and in respect of which she is considered as a *feme sole*. This separate estate a married woman may take by contract with her husband before marriage, or by gift from him, or from a stranger, independently of any contract with the husband. If his legal rights would interfere, he is considered a trustee for the wife of such estate, which is subject to her alienation and to every other incident of property, except the marital control. Such separate estate has its existence only in the state of marriage, and has for its object the protection of the wife's property from her husband. Against the husband's legal rights it is a sufficient protection ; but as the wife has the power of alienation, it is no protection against his moral influence, and many cases have occurred in which the husband, by an exercise of that pressure upon his wife, has defeated the protection which was intended. But as the separate estate originated in equity, it was understood that equity might modify it so as to afford complete protection ; and accordingly it was intimated by Lord Thurlow, that if the gift clearly expressed that there was to be no power of alienation, that intention would be effectuated ; and in a case in which his lordship personally took an interest, a clause to that effect was introduced, since which time the clause has been of common use in wills and settlements ; and such clauses, though anomalous, and not reconcilable with the ordinary legal rules and incidents of property, have been repeatedly approved of and carried into effect, and in *Jack-*

(s) 1 Keen, 428.

*son v. Hobhouse* (t) Lord Eldon expressly said that it was too late to contend against their validity. I apprehend that this restrictive clause or fetter, as it has been called, has always been considered as effecting a modification of separate estate, and, therefore, that it can only exist in the state of marriage. It is said, indeed, that before the case of *Brandon v. Robinson* (u), many professional men considered that the same restriction could be imposed upon the ownership of males. It was decided, however, that it could not: but Lord Eldon, in referring to the opinion of Lord Thurlow, thought it proper to say, that as to marriage, the case was quite different. The validity of the clause against anticipation, in connexion with separate estate, has not, until lately, been doubted; but as both the clauses have their operation in marriage only, it has been considered that the fetter has not any practical effect until marriage, and that, while the woman remains single, the property must be governed by its ordinary incidents. On that principle were decided *Jones v. Salter* (x), *Barton v. Briscoe* (y), *Woodmeston v. Walker* (z); and the first case of *Brown v. Pocock* (a). In the first three of these cases the attempt to alienate was made after the coverture had determined, and in the last case it occurred before coverture; and the Lord Chancellor reversed orders of Sir J. Leach, who had held that the clause prevented alienation even while the woman was single, the intention having been to secure to her the enjoyment of separate property during coverture, which she was not at liberty to defeat by any act of her own while single. That point does not arise here; for, supposing that the wife is at liberty to dispose of the property while single, this case is not affected. But it is said, if, when the interest becomes vested, the woman is single, and has an immediate power of alienation, does she not by the act of marriage subject the property to the marital right of the husband, and prevent the fetter from attaching? and in the arguments on this subject, a desultory or shifting privilege or fetter, attaching on the marriage, and not operating while the

(t) 2 Mer. 483.

(u) 18 Ves. 429.

(x) 2 Russ. &amp; Myl. 208.

(y) Jac. 605.

(z) 2 Russ. &amp; Myl. 197.

(a) 2 Russ. &amp; Myl. 210.

woman is single, has been treated as a sort of absurdity not to be endured. I can see no absurdity, but considerable convenience, in a law which would thus afford adequate protection, and afford it only when it was wanted, which would enable a woman, when adult and single, upon deliberation to settle her property according to her convenience, or, if she think fit, to forego the protection altogether (*b*), and yet guarding against infancy or improvidence, would secure her the protection when married, if she had not deliberately and designedly renounced it before the marriage took place.

It appears to me that this court has not considered that by the fact of marriage the wife does give her separate property to her husband. In *The Countess of Strathmore v. Bowes* (*c*), Lord Thurlow observes, "Suppose a relation had given 10,000*l.* for her sole and separate use; if she had represented it as her own absolutely, so that upon a marriage it would have gone to her husband, this court would have compelled the trustees to give it to the husband, but not otherwise." It is clear, therefore, that Lord Thurlow did not think she did, by the act of marriage, vest property given to her separate use, in her husband; for, looking at her situation before marriage he made a distinction as to property given to her separate use, which the court would protect from the marital power. Moreover, there have been many cases in which property has been given to women to their sole and separate use, and the court has had to declare their rights while single, with reference to which state the words "separate use" can have no meaning, and the declaration has been, that they were entitled to their sole and separate use; and on the marriage of a ward, this court has ordered her fortune to be settled to her separate use during her life (*d*). In *Anderson v. Anderson* (*e*), the point came distinctly before the court, and by an order on motion before the Vice-Chancellor (Sir J. Leach), confirmed by Lord Eldon, and afterwards, at the hearing before Sir J. Leach, the validity of a gift for the future separate use of a woman unmarried when the gift took effect, was de-

(*b*) Of course a woman may, by a declaration made while she is single, put an end to a trust for her separate and inalienable use.

(*c*) 1 Ves. jun. 27.

(*d*) See *Clayton v. Gresham*, 10 Ves. 288.

(*e*) 2 Myl. & Kee. 427.

cided. The decree of the Master of the Rolls in that case was made in November, 1822, but it was not reported until after the order had been made in *Massey v. Parker* (f).

Up to the date of the decree in *Anderson v. Anderson*, then, it seems to have been considered as clear that a gift to a woman, for her separate use, independent of any husband, conferred upon her a separate estate during marriage, although she might be single when the gift vested in interest or possession. If the gift for separate use was limited in terms to the particular marriage, then, as in *Benson v. Benson* (g), the protection was not extended to a subsequent marriage. The state of doubt in which the question at present stands, has been occasioned by the cases of *Newton v. Reid* (h), *Massey v. Parker*, and the second case of *Brown v. Pocock*. *Newton v. Reid*, and *Brown v. Pocock* seem to have been decided by the Vice-Chancellor without argument. In each case the property was given without power of anticipation, and alienations were made during coverture. In the first case the Vice-Chancellor is reported to have said, at the time, that the restrictions were void because there was no gift over upon alienation, and subsequently (i), that the restriction on alienation was rendered ineffectual by the context of the will. In the other case no reason whatever is assigned by the judge, although the reporter has transferred an observation of counsel to his marginal note, but on a subsequent occasion he is reported to have said that the cases of *Barton v. Briscoe* and *Newton v. Reid* proceeded upon this, that the policy of the law being in favour of the power to assign, the courts will not permit that power to be restrained by a fetter which is to take effect on a subsequent marriage." Upon this must be observed, that in *Barton v. Briscoe* the alienation was made during widowhood, while in *Newton v. Reid* it was during coverture.

In the case of *Massey v. Parker* it was a question whether the property *was* given to the separate use of the wife; even if it were so given no fetter was imposed; and the present Lord Chancellor, then Master of the Rolls, having deter-

(f) 2 Myl. & Kee. 174.  
(g) 6 Sim. 126.

(h) 4 Sim. 141.  
(i) 6 Sim. 161.

mined that the estate was not given to the woman for her separate use, the case might have ended there, but his lordship further declared his opinion, that, if it had been so given, it would, upon the marriage, have belonged to the husband. As the validity of the restraint upon alienation appears to me to depend upon the existence of the separate estate, the case of *Massey v. Parker*, if it is to be considered as an established decision, would destroy the restraint upon anticipation equally with the separate estate, in such a case as the present, and it must be admitted that the case of *Newton v. Reid*, although the order was made without argument or opposition, has been more than once referred to without any disapprobation.

In the subsequent case of *Davies v. Thornycroft*, the Vice-Chancellor has said that he always understood that property might be given to the separate use of a woman married or unmarried, and has stated, I conceive correctly, that the practice of the profession has been in accordance with that opinion; and in the same case he has stated, also, I conceive, correctly, that the cases of *Newton v. Reid*, *Barton v. Briscoe*, *Jones v. Salter*, *Woodmeston v. Walker*, and *Browne v. Pocock*, were all cases in which the question was, whether if the Court allows property to be settled to the separate use of a woman, it will also allow a restraint upon her disposing power; but to this statement it is important to add, that the cases of *Jones v. Salter*, *Barton v. Briscoe*, *Woodmeston v. Walker*, and the first case of *Browne v. Pocock*, only show that the Court does not admit of such restraint while the woman is single, while the cases of *Newton v. Reid* and the second case of *Browne v. Pocock* are the only reported cases in which, notwithstanding the fetter annexed to the separate estate, the Court has permitted alienation during coverture.

The result is, that the opinion of the present Lord Chancellor, when Master of the Rolls, appears to have been, that separate estate could not arise upon coverture if the subject of it vested in the woman when single; and the Vice-Chancellor appears to have held, that the separate estate could arise upon a coverture not contemplated at the time of the

gift, but that the restraint upon alienation of such separate estate would be invalid.

In this state of the authorities I have felt myself extremely embarrassed, and wished to have had the case re-argued in the presence of the Lord Chancellor and the Vice-Chancellor, but that course has not been approved of.

Having given this case my best attention, as it does appear to me, that the opinion expressed in *Massey v. Parker* was inconsistent with the decision in *Anderson v. Anderson*, and that the orders in *Newton v. Reid* and the second case of *Browne v. Pocock* are not warranted by the former practice and doctrines of this Court, I cannot refuse the expression of my own opinion to the parties in the cause. I am unable to find any authority prior to those which I have mentioned for the proposition, that a gift to the separate use of a woman is nugatory if it takes effect while she is single, or for the proposition that a gift for her inalienable use, annexed to such an estate, is nugatory, if unaccompanied by a gift over; such a doctrine would defeat the object and purpose which the Court had in view in giving effect to trusts for separate use. As the question must speedily undergo discussion before another tribunal, I will state my opinion, as the result both of the authorities, and of the practice of conveyancers (which has been often admitted to be no mean evidence of the law), that a provision for separate use may take effect during coverture, notwithstanding the property may have become vested during discoveriture; that in respect of such interest, a married woman is in this Court considered as a feme sole; and if the gift is so framed, she has an inalienable estate. If the donor has not given her the full rights of a feme sole, but has withheld the power of alienation, she has, during the coverture, the present enjoyment of an inalienable estate, independently of her husband. During discoveriture the separate estate is suspended, and the restriction upon alienation is a modification of the separate estate, and not distinguishable from it; it has no independent existence, and must be subject to the same rules. Applying these principles to the present case, I am of opinion that the plaintiff here has no right to those estates which, by the will of Nathaniel Bradford, were

given to the separate and inalienable use of Mrs. Armstrong ; and the receiver who has been appointed of those estates must be discharged.

*Jan. 22, 1840.*—**LORD CHANCELLOR.** The question raised in this case is, as to the clause against anticipation ; but I agree with the Master of the Rolls in thinking not only that it necessarily involves the question of separate estate, which has been the subject of much discussion in the profession, but that those two questions are identical as to the principles which must regulate the decisions upon them ; by which I mean, if the case be of a separate estate, without power of anticipation, it must exist with that qualification, or fetter, if it exist at all ; and there is no principle upon which it can be held that the separate estate operates during a coverture subsequent to the gift, but the provision against anticipation, with which the gift was qualified, does not. It is obvious that such a rule would, in practice, defeat the intention of the donor, and in many cases render the provision which he has made for the protection of the object of his bounty, the means and instrument of depriving her of it. When once it was established that the separate estate of a married woman was to be so far enjoyed by her as a feme sole, as to bring with it all the incidents of property, and that she might, therefore, dispose of it as a feme sole might do, it was found, that, to secure to her the desired protection against the marital right, it was necessary to qualify and fetter the gift of the separate estate by prohibiting anticipation. The power to do this was established by authority not now to be questioned, but which could only have been founded upon the power of this Court to model and qualify an interest in property, which it had itself created, without regard to those rules which the law has established for regulating the enjoyment of property in other cases. If any rule, therefore, were now to be adopted by which the separate estate could in any case be divested of the protection of the clause against anticipation, it would, in such cases, defeat the object of the power so assumed. A feme covert, with separate estate not protected by a clause against anticipation, is, in most cases,

in a less secure situation than if the property had been held for her simply upon trust. In the latter case, this Court, with the assistance of the trustees, can effectually protect her; in the other, her sole dependence must be upon the husband not exercising that influence or control which, if exercised, would, in all probability, procure the destruction of her separate estate. In the case of a gift of separate estate with a clause against anticipation, the author of the gift supposes that he has effectually protected the wife against such influence or control. Upon what principle can it be that this Court should subject her to it, and by so doing defeat his purpose, and completely alter the character and security of his gift? The separate estate, and the prohibition against anticipation, are equally creatures of equity, and equally inconsistent with the ordinary rules of property. The one is only a restriction and qualification of the other; the two must, therefore, stand or fall together. Indeed, I do not find any allusion in any case to the possibility of the one surviving the other, until after the discussion as to the continuing of the separate estate though a subsequent coverture had commenced. In my consideration of the cases upon which I am about to enter, I shall assume that there is no ground whatever for the attempt, which has been made in argument, to separate the two. Every authority, therefore, which bears upon the one will bear equally upon the other; and in a case of so much importance, and which has excited so much interest, I have thought it my duty not only to consider every case which has been referred to in argument, but to endeavour to obtain such other information as was within my reach. I will first examine the cases which are supposed to support the proposition, that the absolute interest of the woman which she unquestionably possesses in property given for her separate use, though with a prohibition against anticipation up to the moment of her subsequent marriage, becomes subject to all the qualifications and restrictions of the gift upon such marriage. If *Sir Edward Turner's case* be correctly stated in *Tudor v. Samyne* (i), which differs from the report in 1 Vern. 7, and if *Tudor v. Samyne* be itself accurately reported, that would be

(i) 2 Vern. 270.

an instance of property settled to the separate use of a woman being alienable by an after-taken husband. I do not, however, think that either is of any value on the present question; they are of too early a date. The accuracy of the report on this subject cannot be depended upon, and the point does not appear to have been raised or argued, and cannot be said to have been decided. Although no cases appear to have occurred until very late times in which the question was directly raised, yet decisions took place which necessarily led to the consideration of it. *Brandon v. Robinson* (*k*), and other cases, having brought to view that all restrictions inconsistent with the nature of the estate given are void in gifts to men, the case of similar gifts to females soon occurred. Sir Wm. Grant in *Jones v. Salter* (*l*), and Sir Thos. Plumer in *Barton v. Briscoe* (*m*), held that property settled on a married woman, with a clause against anticipation, was, upon her becoming discoverd by the death of her husband, absolutely disposable by her. *Woodmeston v. Walker* (*n*) proceeded upon the same principle; but it has a more important application to the present case, because Sir John Leach had refused to consider a single woman, to whom an annuity had been given for her separate use, with a prohibition against anticipation, as having the dominion over the fund, because the provision contemplated a future marriage. Against this judgment, Sir Edward Sugden, on an appeal to Lord Brougham, argued that it might be said, as the words of the provision pointed to a future coverture, the restriction would attach upon the plaintiff the instant she married, and the court, looking to that contingency, would protect the executors in their refusal to transfer the fund; but for such a proposition no authority could be adduced; that the language of the judgment in *Barton v. Briscoe*, was directly opposed to it; and that the existence of a desultory and shifting fetter of that description was repugnant to legal principles, and would be attended with much practical inconvenience. Against this, the practice of conveyancers, and the necessity of affording to parents the means of securing property for their daughters, in the event

(*k*) 18 Ves. 429.

(*l*) 2 Russ. & Myl. 208.

(*m*) 1 Jac. 603.

(*n*) 2 Russ. & Myl. 197.

of their subsequent marriage, was urged, but in vain. Lord Brougham declared the plaintiff entitled to an absolute interest in the property, after thus expressing himself:—"It was said that the woman might have the property at her own disposal till she married; and that when the event happened, a sort of postponed fetter might attach—a fetter which would fall off upon her husband's death, and be again imposed should she enter into a second marriage. That would be a strange and anomalous species of estate; nor is it very easy to conceive by what process or contrivance it could be effectually created, unless perhaps by annexing to the gift a limitation over to trustees to preserve it for the woman during the successive covertures." The decision in this case only confirmed the judgment of Sir Thomas Plumer in *Barton v. Briscoe*, because the party claiming the fund was at that time discover; but the observations of Lord Brougham assume that a marriage would not bring, what he calls, the postponed fetter into operation, except possibly by the means he suggests. This case was decided in August, 1831. It does not appear from the report, that *Newton v. Reid* (o) was cited, though it had been decided in December, 1830, which may be accounted for by what is stated in *Browne v. Pocock* (p), that *Newton v. Reid* had been then recently reported. In that case of *Newton v. Reid*, a father had directed his trustees to purchase an annuity for his daughter for her separate use, with a prohibition against anticipation; the daughter was unmarried at her father's death, but having afterwards married, she and her husband joined in assigning the fund to a creditor of his, and both joined in a petition for the transfer of the fund according to the assignment, which the Vice-Chancellor ordered, saying, "the annuity not being given over upon alienation, the restrictions are void." This order was made without argument, and it would not be reasonable, therefore, to consider it as an expression of the deliberate opinion of the judge, if it had not afterwards been recognized and approved. In *Browne v. Pocock* (q), Sir John Leach and Lord Brougham took the same view of the question as they

(o) 4 Sim. 141.  
(p) 2 Russ. & Myl. 212.

(q) 2 Myl. & Kee. 189; and 2 Russ. & Myl. 210.

had respectively done in *Woodmeston v. Walker*, the circumstances of the case being the same; and Lord Brougham commented upon *Newton v. Reid*, saying, that that was a stronger case than the one before him, but did not express any disapprobation of it. The second case of *Browne v. Pocock* (r) was the same as *Newton v. Reid*, the assignment having been after the marriage. I now come to the case of *Massey v. Parker* (s), which excited an interest to which it was very little entitled, either from the authority of the judge, or any novelty in the doctrine. What was said on this subject in that case has been represented as extra-judicial by some, and as a decision upon the point by others. It certainly was not extra-judicial, because it was one of the questions directly in issue, and upon which the decision might have been rested; but it is at the same time true, that there being another point in the case sufficient, in my opinion, to support the judgment I pronounced, it cannot be said that the point in question was that upon which the judgment was founded; and for that reason less attention was perhaps paid to the various considerations belonging to it than it was entitled to, and less than it probably would have received, if the rights of the parties had depended on the determination of it: and I must observe, that although the cases favourable to the proposition by which a prohibition was excluded, were very fully brought before me in the argument, none of those which are most important on the other side were referred to. It had at that time been decided that it was equally incompetent to affix to a gift to a single woman, as to a man, restrictions inconsistent with the estate given; and that, in such cases, the woman, before marriage, or upon becoming discoverd by the death of her husband, had the absolute property in the fund. Not that in the case of either male or female there was a *power of relieving* the property from the qualifications and restrictions imposed upon it; but that such qualifications and restrictions were *void*, and the title to the property absolute. And in *Woodmeston v. Walker* it had been assumed, that such qualifications and restrictions would be equally void after a subsequent marriage, which assumption had in *Newton v.*

(r) 5 Sim. 663.

(s) 2 Myl. &amp; Kee. 174.

*Reid* been carried into effect by directing a transfer of the fund upon the application of the husband and wife. It certainly did not occur to me, as it does not appear at the time to have occurred to any one else, that the separate estate could survive into a subsequent coverture, stripped of the protection which the prohibition against anticipation gives to it, and which alone in many cases prevents it from being an evil rather than a benefit to the wife. I cannot, therefore, think that there was any inaccuracy in saying that I must consider the point as settled by authority. Whether the expression of approbation of the doctrine so established was well founded, is what I am to consider in the present case. That the expressions used in that case were not considered as promulgating any new doctrine, may be inferred from the case of *Malcolm v. O'Callaghan* (t). In that case, property had been settled to the separate use of a married woman, as against the then existing or any future husband, with a prohibition against anticipation. The husband died, and she married a second husband, and they together applied for payment of the fund. *Barton v. Briscoe* (u), *Newton v. Reid*, *Woodmeston v. Walker*, and *Massey v. Parker*, were cited; and the Vice-Chancellor ordered the payment, saying, the general rule of law to be deduced from those cases was, that where a settlement to the separate use of the wife was made with a view to an existing marriage, or a marriage then in contemplation, it was competent for the wife, when she became discovered from that marriage, to rid the fund of the fetter imposed on it; and if such a limitation was made, by a will or otherwise, in favour of a feme sole, who had not taken upon herself a state of coverture, but who was come of full age and able to act for herself prior to coverture, she was entitled to call for a transfer of the settled fund; and that the only means of preventing such party from her right to have the fund paid over, was to insert in the settlement or will, which created such a trust, a gift over, in the event of alienation. No distinction is here taken between the separate estate and the prohibition against anticipation, or between the doctrine in *Massey v. Parker* and the other cases. The decision in

(t) Dec. 14, 1835; 5 Law Jour. N. S. 137.

(u) Jac. 603.

*Johnson v. Freeth* (x) is even more pointed, because *Massey v. Parker* does not appear to have been referred to; but, on the authority of *Newton v. Reid*, sanctioned by Lord Brougham, the Vice-Chancellor decreed payment of the fund to an assignee of the husband and wife, saying, that, except as to the marriage with reference to which the settlement containing the clause against anticipation was made, the clause was to be taken as a nullity; but that, if such a clause applied to a woman before coverture, it was bad altogether; and if to a woman under coverture, it was void when the coverture ceased. It is indeed true, that in *Benson v. Benson* (y), although there was no decision upon the subject, there was some observations of the Vice-Chancellor, which seem to aim at a distinction between the separate estate and the clause against anticipation; and in *Davies v. Thornycroft* (z), the Vice-Chancellor expresses a distinct opinion, that although the prohibition against anticipation cannot operate during a subsequent coverture, the property may maintain its quality of separate estate. I have before said, that I concur with the Master of the Rolls, in thinking that this doctrine cannot be maintained. In tracing the fluctuations of opinions which have existed upon questions relating to the separate estate of married women, it cannot but be observed, that, so late as the cases of *Woodmeston v. Walker*, and *Browne v. Pococke* (a), Sir John Leach was of opinion, that in order to preserve to a woman the benefit of a gift for her separate use without anticipation, she ought not to be enabled to dispose of the property while single or discover; the contrary is now clearly established, but the power of providing for daughters, and against the chance of future want, is thereby greatly impaired. Observations, therefore, which may have fallen from judges before it was made apparent that the separate use of a married woman in her property, being only a creature of equity, created for the protection of married women, cannot exist so as to affect the power of a single woman, must be received with some qualification. The case of *Beable v. Dodd* (b) was

(x) March 2, 1836; 5 Law Jour. N. S.  
143; 6 Sim. 423, n.  
(y) 6 Sim. 127.

(z) 6 Sim. 420.  
(a) 2 Russ. & Myl. 210.  
(b) 1 T. R. 193.

much relied upon by the respondent ; and, strange as it may appear that a decision of common law judges in an action of replevin should be applicable in a case of separate estate, which is said to be a creature of equity, it is certainly entitled to much consideration. It is, however, to be observed, that the whole of the argument and judgment turned upon the construction of the instruments, and that there was in that case an express power reserved to the woman ; and Mr. Justice Lawrence, in his argument for the defendant, said :—“ Cases of trust created by the husband for the separate use of his wife are very different from the present case of a devise generally to a woman notwithstanding her coverture.” In the earlier case of *Carleton v. The Earl of Dorset* (c), there was an express power ; and in *Edmonds v. Dennington* there cited, it does not appear by what means the power of the wife was secured to her. In *Berner v. Davis* (d), the devisee was married at the time of the gift, and the only question arose from there being no trustee appointed. The case of *Lady Strathmore v. Bowes* (e) has been cited as conclusive of Lord Thurlow’s opinion ; but on referring to the report of the same case in 2nd Brown, it will be found, that the settlement was upon trust to pay the rents, &c., to such uses as he should, whether sole or covert, appoint. In *Acton v. White* (f), the only question was, whether the words used amounted to a prohibition against alienation. The expressions of Sir John Leach, therefore, that the intention was only to exclude the marital rights of any present or after-taken husband, cannot be considered as of any weight on this subject, which was not before him. The Vice-Chancellor, in *Davies v. Thornycroft*, considers the case of *Simson v. Jones* (g) as decisive ; but upon examining the case, it will be observed, that the wife never had any power of disposing of the property, and she was an infant when she married, and the property was to vest in her upon marriage under twenty-one, and then to be for her separate use ; the estate and the provision for the separate use took effect at the same moment

(c) 2 Vern. 17.

(d) 2 P. Wms. 316.

(e) 1 Vesey, junior, 22 ; 2 Brown’s

Chancery Cases, 345, S. C.

(f) 1 Sim. &amp; Stu. 432.

(g) 2 Russ. &amp; Myl. 365.

and by the same act. If the observations of Sir John Leach are construed with reference to the case before him, they do not appear to have any application to the present case. *Anderson v. Anderson* (*h*) may, from its circumstances, be the most important of all the cases in favour of the separate estate being in force throughout a subsequent coverture; but unfortunately there is no report of the grounds of the judgment of either Sir John Leach or Lord Eldon; and there were facts in that case which may have been relied on by those learned judges which have no application to the general question. There had been a negotiation before the marriage respecting the property. The husband admitted that he had promised not to sell it; it was also part of the wife's case that the husband had refused to maintain her. Sir John Leach's decree is the only important part of the case, because there were upon the answer sufficient admissions for an injunction till the hearing, without any decision upon the general question. The decree, however, must be considered as entitled to great weight; but it occurred in 1821, and before those cases which have created the difficulty and raised the doubt; for it must not be forgotten that Sir John Leach always maintained that the separate estate, with all its qualifications and restrictions, continued in operation during the time the woman was not under coverture. It is the establishment of the principle that that is not so which has created the difficulty of supporting it during the subsequent coverture. The case of — v. *Lyue* (*i*) has been often referred to for the purpose of introducing the authority of Lord Lyndhurst into this discussion. From the report of that case, it is not possible to ascertain what was the point in discussion; I have, therefore, examined the papers in the cause. The plaintiffs were holders of a promissory note of a married woman, under which they demanded payment out of her separate estate; and the bill stated distinctly, as a fact, that the property was held upon trust for the separate use of the wife, which, upon the demurrer, must have been taken as a fact, and so it really was; for the plaintiff afterwards amended the bill, and stated a settlement upon the marriage by which the property was re-

(*h*) 2 Russ. & Myl. 427.

(*i*) Young, 562.

settled to the separate use of the wife. The demurrer was very properly overruled ; and this question did not arise in the cause, whatever may have been the opinion of the learned judge as to the general question, which he had no occasion to express. Such then is the state of the authorities on this very important question. It is said to have been generally understood in the profession, that the separate estate would continue to operate during a subsequent coverture ; and that conveyancers have acted so continually upon that supposition, that very many families are interested in the decision of this question. That circumstance ought to have great attention paid to it. For the future, it would not probably be found difficult to obtain the desired security for the future wife by other means consistent with the well-established rules of property ; but the existing arrangements must depend on the decision of this case. I have over and over again considered this subject with a great anxiety to find some principle of property, consistent with the existing decisions, upon which the preservation of the separate estate during a subsequent coverture could be supported. I have been anxious to find means for preserving it ; not only to maintain those existing arrangements which have proceeded upon the ground of its validity, but because I think it desirable that the rule should, if possible, be established for the future, believing as I do, that when a marriage takes place, the wife having property settled to her separate use, all the parties, in general, suppose it will so continue during the coverture. To permit the husband therefore to break through such a settlement, and himself to receive the fund, would in general be contrary to the intention of the parties, and unjust towards the wife. This view of the case has led to a suggestion which has often been made in argument, by which the object might be attained without violating any rule of property, viz. by supposing the husband, marrying the woman with property so settled, tacitly to assent to such settlement, or at least to be barred by an equity not to dispute it. I was for some time much disposed to adopt this view of the subject, and in all cases in which the husband was cognizant of the fact, there would be much of equitable principle to support the gift or settlement against him ; but

putting the title of the wife upon such assent of the husband, assumes that, but for such assent, it would not exist. It abandons the idea of the old separate estate continuing through the subsequent coverture, and supposes a new separate estate to arise from the act of the husband. If the title of the wife were to rest on that supposition, I fear that the remedy would be very inadequate, and that questions would continually arise as to how far the circumstances of each case could afford evidence of assent, or raise this equity against the husband. After the most anxious consideration, I have come to the conclusion, that the jurisdiction which this court has assumed in similar cases justifies it in extending it to the protection of the separate estate, with its qualifications and restrictions attached to it throughout the subsequent coverture, and in resting such jurisdiction upon the broadest foundation,—that the interests of society require that this should be done. When this court first established the separate estate, it violated the laws of property as between husband and wife; but it was thought beneficial, and it prevailed. It being once settled that a wife might enjoy separate estate as a feme sole, the laws of property attached to this new estate; and it was found as part of such law, that the power of alienation belonged to the wife, and was destructive of the security intended for it. Equity again interfered, and, by another violation of the law of property, supported the validity of the prohibition against alienation. In the case now under consideration, if the after-taken husband be permitted to interfere with the property given or settled upon the marriage to the separate use of the wife, much of the benefit and security of the rules which have been so established will be lost. Why, then, should not equity in this case also interfere; and if it cannot protect the wife consistently with the ordinary rules of property, extend its own rules with respect to the separate estate, so as to secure to her the enjoyment of that estate which has been so intended for her benefit? It is no doubt doing violence to the rules of property to say, that property which, being given with qualifications and restrictions which are held to be void, therefore belonged absolutely to the woman up to the moment of her marriage, shall not be subject to the ordi-

nary rules of law, as to the interest which the husband is to take in it ; and that is the sense, and the only sense in which the expressions used in *Massey v. Parker*,—" Why may she not, by the act of marriage, give it to her husband ?"—are to be understood ; but it is not a stronger act to prevent the husband from interfering with such property, than it was originally to establish the separate estate, or to maintain the provision against alienation. In doing this, I feel that I have much to overcome ; of which the observations thrown out by myself in *Massey v. Parker* is the only part of which I do not feel the important weight ; but I have to contend with Lord Brougham's observations in *Woodmeston v. Walker*, and the Vice-Chancellor's decision in *Newton v. Reid*, *Browne v. Pocock*, *Malcolm v. O'Callaghan*, *Johnson v. Freeth*, and *Davies v. Thornycroft*, to which I have before adverted ; and the doctrine now established, though denied by Sir John Leach in *Browne v. Pocock*, and *Woodmeston v. Walker*, that before marriage, or after the coverture has determined by the death of the husband, the settlement or gift to the separate use, and the prohibition against anticipation, are wholly inoperative and void. In establishing the validity of the separate estate, with its qualifications, which constitutes its value, that is, a prohibition against anticipation, I am not doing more than my predecessors have done for similar purposes ; and I have much satisfaction in finding myself justified, upon the grounds I have stated, in doing what in me lies in dissipating the alarm and removing the danger which have prevailed, lest the separate estate should be held not to exist at all during the subsequent coverture, or what would in many cases be a greater evil, that it should exist without the protection of the clause against alienation. I therefore affirm the decree appealed from.

---

[*The following Cases were decided after the Master of the Rolls had given Judgment upon Tullett v. Armstrong, and before the Judgment of the Lord Chancellor in the same Case was pronounced.*]

---

DIXON v. DIXON. M. R. (Mich. T. 1838.)

*Trust, in a Marriage Settlement, for separate Use for Life, as against the present and any future Husband, with restraint upon anticipation, with a contingent Limitation of the Corpus absolutely, in case of surviving the present Husband, good with reference to every future Coverture.*

The bill was filed by Mrs. Dixon, a feme covert, living separate from her husband, by her next friend, to have the benefit of a fund of 1,900*l.* consols, to which she was entitled under the will of her father. In August, 1821, Mrs. Dixon married her first husband, Mr. Simpson, and on that occasion a settlement was made of the income of the fund on her for life for her separate use and without power of anticipation during her marriage with Mr. Simpson, or any future coverture, with a limitation of the corpus of the fund for the benefit of the children of the marriage, and if no children who should become entitled thereto, then to Mrs. Dixon absolutely, in case she survived her husband. Mrs. Dixon survived Mr. Simpson, and there were no children of this marriage. She afterwards married her present husband, Mr. Dixon, but no further settlement was made of the property. A separation afterwards took place, and Mrs. Dixon caused the present bill to be filed, praying that the income might be paid to her for life, or, if the Court should be of opinion that the separate use and anticipation clauses did not extend to a future coverture, for a reference to the Master for a settlement.

Lord LANGDALE, M. R., held that this came within *Tullett v. Armstrong*, and that the two limitations did not coalesce on the death of Mr. Simpson, so as to prevent the separate use and anticipation clauses from taking effect on Mrs. Dixon's second marriage.

NEDBY v. NEDBY. V. C. (Nov. 1838.)

*A Gift to the separate Use of a Widow takes effect on her  
Second Marriage.*

The plaintiff was the widow of Keegan, who, by his will, devised to William Nedby and Thomas Anns, two leasehold tenements, and all his personal estate, in trust to pay debts and expenses, and invest the residue in the funds in trust for his wife, Frances; and the interest or dividends to arise therefrom, when the same should become due, to be paid unto his said wife for her natural life, to and for her own sole and separate use and benefit, and over which any future husband she might happen to marry should have no control, and her receipt should be a sufficient discharge to his executors and trustees; and the testator declared that his wife should have full power by any will, instrument, or instruments, in writing, to be by her duly executed, to bequeath or dispose of one moiety of the monies to be invested. The plaintiff, after the death of the testator, married the defendant Nedby, from whom she was separated some years after. Upon her marriage with Nedby, she executed a deed, by which, in consideration of the love and affection which she had for her husband, she assigned and appointed her moiety of the leasehold tenements, and of the sum of 1,365*l.*, being the sum produced by the sale of the testator's effects, to Nedby, for his absolute use, so far forth as she was enabled to do under and by virtue of the trust, power, and authority, expressed in the said will, for enabling her to dispose of the same. The 1,365*l.* had been paid into Court; and a motion was now made on behalf of the plaintiff, to have 47*l.*, arising from the last two half years' dividends, and all future dividends arising from the said sum, paid to her upon her sole receipt.

VICE-CHANCELLOR.—I certainly did understand the Lord Chancellor to express himself, in a conversation I had with him and the Master of the Rolls, the first day of this term, to the effect that he still retained the opinion he expressed in *Massey v. Parker*. In the present case the question is, whe-

ther, by the deed of appointment to the husband, it was the intention of the plaintiff to assign her present life interest in the entirety of the fund, or, more properly, one moiety or half part of the fund. I am clearly of opinion, the object of the deed was, at the utmost, to give the husband an interest in a moiety of the reversion, over which the wife had a power of appointment. As the case of *Massey v. Parker* has been alluded to, I will only observe, that my notion of the general point in that case was, that trusts created for the separate use of women were trusts which this Court had always recognized and preserved, and which the Court would always recognize and preserve, unless the legislature thought right to declare it should be otherwise. When I decided the case of *Davies v. Thornycroft* (*k*), I said there had been no judicial decision to the contrary. The extra-judicial opinion of the Lord Chancellor, in *Massey v. Parker*, is expressed in very guarded terms; and I, as a judge, sitting here to administer the settled law of the Court, am not called upon to depart from that settled law, because the Lord Chancellor for the time being may be considered to have pronounced an extra-judicial opinion, which is contrary to my notion of that law. The question how far a trust for the separate use, with a clause against anticipation, as in *Newton v. Reid* (*l*), operates to prevent a married woman disposing of her property *before* marriage is different from the present, which is merely whether there could be any separate trust for the use of a woman when married. It appears to me, that as soon as the widow of Keegan married Mr. Nedby, then the trust for the separate use took effect, which trust, as I understand it, was to her separate use, free from the control of the husband, with a direction that her receipt alone should be a sufficient discharge to the executors and trustees. I think, the proper construction would be one which would prevent the wife from alienating the property. Looking at the whole of the transaction, I am of opinion, a question might be raised at the hearing, whether the deed would operate on the wife's interest in a moiety of the reversion. It is not possible to say it has

(*k*) 6 Sim. 423.

(*l*) 4 Sim. 141.

affected the life-interest in possession, and the dividends of the moiety secured to her separate use. I have, therefore, no difficulty in making the order as prayed.

---

STEAD v. NELSON. M. R. (Nov. 18, 1839.)

*Though the Legal Estate of Freeholds is vested in a Feme Covert, yet if it is declared in the Conveyance to her that she shall hold such Life Estate for her separate Use, in Equity she has the Powers of a Feme Sole over it.*

In 1831, on the marriage of J. Booth with Joseph Waterworth, freeholds belonging to J. Booth were conveyed "to the use of the said J. Booth, for and during the term of her natural life, to and for her own sole and separate use and benefit, or to the use of such person or persons as the said J. Booth, by writing under her hand and seal, should, at any time during her intended coverture, direct or appoint; and in default of such direction or appointment, then in trust to pay the rents, issues, and profits of the said hereditaments and premises into the proper hands of the said J. Booth, or otherwise to permit her to receive the same for and during her natural life, to and for her sole and separate use wholly, and independently of the said J. Waterworth, and without the same being subject to his debts or engagements." And the receipt of the said J. Booth alone, notwithstanding her coverture, was thereby declared to be a good and sufficient discharge for so much of the said rents and profits as should therein be acknowledged or expressed to be received; and after the decease of the said J. Booth, the lands were limited to the use of the said J. Waterworth for life, with remainder to the use of the children of the marriage, according to the appointment of J. Booth; and in default thereof to the use of the children as tenants in common; and in default of issue of the marriage, to the use of such person or persons as the said J. Booth alone, notwithstanding her coverture, by any instrument in writing, to be sealed and delivered by her in the presence of two or more credible witnesses, or by her last will and testa-

ment, should appoint; and in default of such appointment, to the use of the brothers and sisters of the said J. Booth. The marriage took effect, and in March, 1833, Mr. and Mrs. Waterworth borrowed 250*l.* from Samuel Marshall, which was secured on the settled property by indentures of lease and release and appointment executed by Mrs. Waterworth. This sum was paid off by Mrs. Waterworth after her husband's death, and before the institution of this suit. In September, 1835, Mr. and Mrs. Waterworth borrowed 120*l.* from the plaintiff, J. Stead, and gave him their joint and several promissory note for the amount. They also on the 15th September, 1835, signed a memorandum of agreement, whereby, after reciting the loan of 120*l.*, the promissory note, and an agreement to execute a mortgage of the premises, and to insure the life of Mrs. Waterworth for 120*l.*, Mr. and Mrs. Waterworth severally agreed with the said J. Stead, that they or the survivor of them would on his request execute a legal mortgage of the lands to him, and they also agreed to insure the life of Mrs. Waterworth for 120*l.* This agreement was not under seal, but was attested by two witnesses. J. Waterworth died on the 3rd Oct. 1836, intestate, leaving Mrs. Waterworth and two children, issue of the marriage, surviving him. The widow, having taken out letters of administration to her husband, was applied to by the plaintiff, for payment of his mortgage-debt and interest. On the 27th of February, 1837, the plaintiff having been informed that Mrs. Waterworth had applied to Mr. Tolson for the loan of 400*l.* on the security of the said premises, served a notice in writing on Mr. Tolson and his solicitor, of his equitable mortgage. Notwithstanding this notice a legal mortgage of the premises was, on the 10th March, 1837, executed by Mrs. Waterworth to secure the sum of 400*l.* lent to her by Tolson. The bill was filed against Tolson and Mrs. Waterworth, who since the institution of the suit had married Mr. Nelson, and it prayed a declaration that the plaintiff was entitled to a valid mortgage of the premises comprised in the agreement, subject to the interest of the children of the marriage in priority to Tolson, and that the defendants might be compelled to execute the same. The points argued were, first, whether the life estate given to Mrs.

Waterworth by the settlement was so limited for her separate use as to enable her to charge it as a feme sole; and, secondly, if were so, whether a mere agreement to execute a mortgage operated to bind her life interest after her husband's death. The question as to whether the agreement was a good equitable exercise of the powers respectively given to her by the settlement over her life interest and the inheritance, was not raised, the plaintiff seeking to charge her life interest only, and resting his case on the limitation to her separate use. It was contended for the defendant, that the wife having the legal estate, her husband in equity was a trustee, not of the legal estate, but of the interest to which he is entitled in his marital right; and that it was necessary that the legal estate should be in trustees to supply the separate use in equity, in order to give the wife such a disposing power over it as if she were a feme sole. But even if the wife had a separate estate, it continued during the life of her husband and no longer; and if she survived him, she was entitled to a sort of reversionary interest for life, free from the separate use, which she could not charge by anticipation.

Lord LANGDALE, M. R., said, this was a case in which the defendant had advanced money with notice of the plaintiff's claim. There was no hardship on the defendant Tolson, but he was endeavouring to throw a hardship on the plaintiff. The estate in question was vested in Mrs. Nelson for life for her separate use. Supposing, as was contended, that the legal estate was vested in her, though a court of law would have taken no notice of the words "for her separate use," yet in a court of equity she had during coverture the same right given to her as if she were a feme sole. And having that right, she entered into a contract, and agreed to execute a mortgage. Now, what did that right extend over? Over her life interest. Her life interest, it is true, might be prolonged beyond her husband's. But if it were so, what was the consequence? That she had then an absolute power at law as well as in equity to dispose of her estate. The doctrine of reversionary interests did not apply to these circumstances. There must be a declaration that the plaintiff was entitled to a legal mortgage.

NEWLANDS v. HOLMES and PAYNTER, Dec. 2, 1839.

*An Executrix, to whom Personal Property is bequeathed, with a Declaration that it should not be liable to the control of any future Husband, is entitled to the Benefit of such Declaration as against the Creditors of a Husband whom she marries after having proved the Will.*

*A settlement, upon marriage, of a portion of property held by the intended wife subject to a declaration excluding any husband's control, by which settlement a partial interest in the settled property was given to the husband, does not constitute a gift by implication of the unsettled part of the wife's separate estate to the husband.* John Peter Reina, by his will, bearing date the 3d of October, 1833, bequeathed to Mary Sarah Reina all his property whatsoever, and appointed her sole executrix of his will, and thereby specifically directed that any property he might have given or should give to her should not be liable to the interference or control, in any way, of any person or husband she might be married to, or liable to his then present or future debts, but that her receipt alone should be a discharge for all the money or effects he might give or leave to the plaintiff; and that she should dispose of the same by her will and testament as she pleased, notwithstanding her coverture. Mary Sarah Reina proved the will on the 23d of October, 1833, and intermarried with William Newlands on the 20th of November following, and continued to reside with him in the house, No. 19, West-Square, which, with the furniture, plate, &c. therein, formed part of the property bequeathed to her by her father. A settlement of 6000*l.* Bank-stock was made upon Mrs. Newlands at the date of her marriage. The defendant Holmes having recovered 200*l.* damages at the summer assizes in an action of trespass against William Newlands, entered up judgment on the 25th of November, and issued a writ of execution to the sheriff of Surrey, whereupon Mrs. Newlands filed the present bill, which stated that she had not, at the time of her marriage, or at any time since the death of her father, any property except that which she took under his will, and that all the goods and chattels

in the house (which were separately set forth) were either a portion of the testator's property, and subject to the trusts of his will, or had been purchased out of the income of her separate estate, and therefore she submitted that her husband was a trustee for her of all such legal estate and interest as she had in the leasehold premises, and the goods and chattels therein, to her separate use.

On Dec. 2, 1839, Mr. *Jacob* (with whom was Mr. *Bethell*) moved to dissolve an injunction granted on the 28th of November against the sheriff of Surrey, to restrain him from executing process upon the writ, against either the leasehold premises, No. 19, West-Square, Southwark, or the goods and chattels therein, in respect of any claim against the husband of the plaintiff.

It was contended that, this being the case of a gift to a woman absolutely, and she being also executrix, there was no ground for drawing any distinction between legal and equitable ownership. Had the legal ownership been in trustees, had the marriage been before the death of the father, or had the bequest been to a married woman, the case would have been different. The marriage amounted to an unqualified gift to the husband, and there was no contract or stipulation to limit the effect of the gift: on the contrary, there was a stipulation as to a portion of the property, that it should be settled, and the necessary presumption was, that as to the rest it was meant the marital right should prevail. The present case was precisely the same as *Massey v. Parker*, and must be governed by that case until the question was decided otherwise.

The VICE-CHANCELLOR did not call upon the counsel who supported the injunction to address the Court, but said he thought the point very simple. If a man married a woman who had personal chattels, *prima facie* at law the act of marriage constituted a gift to the husband of those chattels. If the wife had a term of years, either legal or equitable, the law said, during coverture the husband might assign the term if he pleased, and if he survived the wife, he took it as a gift

by marriage, and was not obliged to administer to her for the sake of constituting the term in him in virtue of her right. If he died in her lifetime, the term survived to her. With respect to choses in action, they remained in the wife during coverture, unless the husband during coverture reduced them into possession. But his Honour always understood that a father might make a gift to the separate use of his daughter; and in this case it appeared very plain to him that the testator expressed an intention that there should be a trust for the separate use of his daughter, although he had not so fully worked out that intention as he might have done. For, having given the property to his daughter, and appointed her sole executrix, he specifically directed that any property he might have given or should give to her should not be liable to the interference or control in any way of any person or husband she might be married to (which showed what inaccurate expressions this gentleman used, because his words imported that she might be married to a person who might not be her husband), or liable to his then present or future debts, but that her receipt alone should be a discharge for all the money or effects he might give or leave to the plaintiff, and that she should dispose of the same by her will and testament as she pleased, notwithstanding her coverture. His Honour apprehended, that when the testator died, and his daughter proved the will, she certainly at law became the absolute owner of all the property of a personal nature the father gave by his will, and when she married, she did at law give to her husband the complete power to dispose of all the personal property. But then the question was whether, when the husband had married a woman who took the personal property under such a bequest as this, he did not of necessity subject the marital right and the marital powers which he acquired by marrying the executrix to that trust which was affixed (his Honour should say) by the will on the property the testator gave to his daughter. His Honour could not but think, until he was corrected by a higher authority, that the husband, by marrying the executrix, did, though he clothed himself with legal rights and legal powers, take them subject to that trust which was affixed to the property. The marriage settlement

had very properly been called to the notice of the Court. His Honour had read it through, and found it was solely confined to a sum of 6000*l.* Bank-stock, which was admitted to have been part of the father's estate. It was not a settlement of Bank-stock to the separate use of the daughter, in the same manner in which she took it by the will; but, on the contrary, it appeared to him to be a reduction and limitation of the power which, as the *cestui que trust* of her father's will, she had over it; for the stock was transferred into the names of three persons as trustees in trust for her separate use for life, and then, if she happened to survive her husband, it was to go to her absolutely; but if her husband survived her, then she had no power of disposition over it otherwise than by a testamentary disposition, and so much as she did not dispose of by will would belong to her husband. It was quite clear by the constitution of the settlement that the husband was let in to participate for his own benefit in the Bank-stock, to the prejudice and in diminution of those rights the wife had under her father's will. If there were express words that in consideration of the settlement being so made the husband should become absolute owner of all the wife's other property, then that would be a relinquishment of her rights over all the other property; but the settlement was totally silent as to that, and he thought it would be a new thing to say that where the husband derived a benefit from the wife's property, and gave her no benefit, and nothing elsewhere was said or treated of except what related to the wife's property, it should *ipso facto* give the husband all the property not contained in the settlement. His Honour could not but think, upon the true construction of the father's will and the settlement taken together, that the wife stood in this position, viz., that the husband, so far as he had any right under the marital power, had that right as trustee for his wife; and therefore he thought the chattels were not seizable in equity, though they might be at law, and that the motion to dissolve the injunction must be refused.

## A WIFE'S EQUITY

### TO A SETTLEMENT.

1. A MARRIED woman has a moral right to a provision for herself and her children out of property to which she was entitled before marriage, or which subsequently devolves upon her. This moral right is not recognized in courts of law, and where the husband can recover the property at law a court of equity will not interfere with his doing so. But where the wife's interest is merely equitable, or as the rule is very accurately stated by Mr. Jacob (*a*), "when the property, though in its nature legal, becomes *from collateral circumstances*, the subject of a suit in equity, it appears that the wife's right to a provision out of it will attach. Thus, in a case where a legal debt was due to the wife, Lord Eldon observed that if the husband had filed a bill to establish a right of set off in equity in respect of the debt, he must have made his wife a party—thereby letting in her equitable claim" (*b*).

2. The right is personal to the wife, and may be waived by her at any time before the settlement is actually made (*c*); and if she die before, upon a bill being filed, she has made her claim, no claim can be made by her children (*d*). "The compelling settlements at first arose upon the husband coming here for assistance. It is personal to the woman; if carried further it would be attended with bad consequences to creditors. There is no case wherein this court refused assistance to the husband after the death of the wife, without obliging him to make provision for children (*e*).” And the

(a) 1 Rop. Husb. & Wife, 258, 2nd ed. See 1 Eq. Ab. 64.

(b) *Exp. Blagden*, 2 Rose, 251. See *Carr v. Taylor*, 10 Ves. 574.

(c) *Re Walker*, Cases tem. Sugden, 324.

(d) But the children are entitled to the benefit of the decree though the wife dies before settlement, *Groves v. Perkins*, 6 Sim. 584; *Groves v. Clarke*, 1 Keen, 132. The decree gives no inte-

rest to the husband, and if he dies before the settlement is executed, the whole survives to the wife. See *Macaulay v. Phillips*, 4 Ves. 15, 19, and *Murray v. Lord Elibank*, 10 Ves. 88.

(e) *Per* Lord Northington, *Scriven v. Tapley*, Amb. 209, 2nd ed 337, S. C. See *Murray v. Lord Elibank*, 13 Ves. 6; *Lloyd v. Williams*, 1 Mad. 453; *Steinmetz v. Hathlin*, 1 Glyn. & Ja. 64; *Johnson v. Johnson*, 1 Ja. & W. 478.

equity arises in favour of the wife alone where she has a mere life interest (*f*). But where the wife has insisted on her equity against her husband's assignees in bankruptcy, she cannot subsequently, by a release in favour of her husband, deprive her children of the benefit of it, *Barker v. Lea*, 6 Mad. 380. A settlement of part of the fund, such as the court would have settled, it seems, would prevent any further claim (*g*), and the claim of course does not arise if by the terms of any antenuptial settlement or contract, it appears to have been intended that the husband should be absolutely entitled to the wife's fortune (*h*).

3. The proportion of the fund which is settled varies with circumstances—as, there being a provision already in existence, &c.; but the general rule is to settle *half*—never the whole (*i*), unless in the case of marrying a ward of court, without leave (*k*).

4. It was formerly doubted whether the wife's equity was enforceable against the husband's assignee for value, but it is now settled that the assignee is bound by it equally with the husband himself; see cases cited in *Elliott v. Cordell* (*l*). In that case Sir J. Leach, fully recognizing the general doctrine, held that it did not apply to the case of an assignment of a *life interest* in the dividends of stock; he said, "I find no authority for the equity claimed by the wife as against the particular assignee in the case of an interest given to the wife for her life, and it does not follow as a corollary or consequence from any established doctrine of the court. Where an absolute equitable interest is given to the wife, the court will not permit the husband to possess it without making a provision for the wife, or her express consent, and all who claim under the husband must take his interest subject to the same equity. But where an equitable interest is given to the wife for her life only, this court does permit the husband to enjoy it without the consent of the wife (*m*), and without making any provision for her. It is true that if the husband desert his wife, and fail to perform the obligation of maintaining her, which is the condition upon which the law gives him her property, this court will apply any equitable interest which he retains for the life of his wife, either wholly or in part, for the main-

(*f*) See *Sturges v. Champneys*, *infra*, p. 63.

(*g*) *Stamper v. Barker*, 5 Mad. 164, *Wright v. Morley*, 11 Ves. 12.

(*h*) See 1 Rep. Husb. & Wife, 290; *Druce v. Denison*, 6 Ves. 385.

(*i*) *Berresford v. Hubson*, 1 Mad. 363; *Jewson v. Moulson*, 2 Atk. 423; *Steinmetz v. Hathlin*, 1 Gl. & Ja. 64; *Green*

*v. Otte*, 1 Sim. & St. 250; *Ball v. Coutts*, 1 Ves. & B. 303; *Exp. Thomson v. Wyatt*, 1 Dean. 90.

(*k*) See 1 Rep. H. & W. 268; *Stackpole v. Beaumont*, 3 Ro. 98; *Sermyn v. Baxter*, 6 Mad. 32.

(*l*) 5 Mad. 155.

(*m*) *Sleech v. Thorington*, 2 Ves. sen. 560.

tenance of the wife (*n*); and if the husband becomes bankrupt, or takes the benefit of an insolvent debtors' act, this court will fasten the same obligation of maintaining the wife out of property of this description which devolves by act of law upon the general assignee (*o*); for when the title of such assignee vests, the incapacity of the husband to maintain the wife has already raised this equity for the wife; but the same principle does not necessarily apply to a particular assignee who purchased this interest when the husband was maintaining the wife, and before circumstances had raised any present equity in this property for the wife (*p*).” The same rule, of course, applies to a life interest in any other species of property (*q*). However well settled it may be, (and the authorities are remarkably consistent,) the doctrine of *Elliott v. Cordell* is obviously anomalous, since, where the wife is entitled to the *corpus* of the property, equity enforces a settlement during the life of the husband as well as after his death, against a particular assignee, without reference to the ability of the husband to maintain her. In accordance with the above reasoning, Sir J. Leach, in the case of *Aguilar v. Aguilar* (*r*), held that the wife was not entitled to a provision out of her equitable life interest, even as against the assignees in insolvency of her husband, when she had an adequate provision to her separate use. It must also be observed that this power of the husband over property given in trust for his wife during her life, has been said to extend only over the period of their *joint* lives; the interest of the wife surviving her husband being considered as reversionary, and therefore inalienable by him, on the principle of *Purdew v. Jackson* (*s*), *Honner v. Morton* (*t*), *Stiffe v. Everitt* (*u*). But see *Stead v. Nelsom*, *ante*, p. 53.

5. Whether the wife may, under any circumstances, enforce her equity by filing a bill, is not altogether determined, neither is the power of the trustee by his conduct to affect her rights well defined. As the court always requires the wife to be made a party to a bill respecting property out of which she would be entitled to a provision, there does not seem to be any occasion for her to file a bill under any circumstances, so long as the trustee remains passive. But the protection would be very imperfect if equity allowed the

(*n*) See *Bullock v. Menzies*, 4 Ves. 798.

(*o*) *Prior v. Hill*, 4 B. C. C. 138; *Kensington v. Dollond*, 2 Myl. & K. 184; *Exp. Thomson v. Wyatt*, 1 Deac. 90. The wife of an insolvent may have the entire fund, *Brett v. Greenwell*, 3 You. & C. 230.

(*p*) See *Wright v. Morley*, 11 Ves. 12; *Carter v. Anderson*, 3 Sim. 370.

(*q*) As, an annuity out of land, *Stanton v. Hall*, 2 Russ. & M. 175.

(*r*) 5 Mad. 414.

(*s*) 1 Russ. 1.

(*t*) 3 Russ. 65.

(*u*) 1 Myl. & K. 41. See *Wade v. Saunders*, Turn. & R. 306.

trustee, against the wishes of the wife, to pay over the fund to the husband and his assignee. See *Macaulay v. Phillips* (x), where Sir R. P. Arden, M. R. said, "It is clear that no agreement *except with the intervention and act of the trustee* is of any avail, or can be attended to in any degree; if it were, there could be no necessity for the examination of the wife (y);" "even if the trustee, *after a bill filed*, and particularly after a decree for a proposal, should pay, the court would hold it a payment by wrong, and would set it aside." In *Murray v. Lord Elibank* (z), Lord Eldon said, "The husband where he can is entitled to lay hold of the wife's property, and the court will not interfere. Previously to a bill a trustee, who has the wife's property, real or personal, may pay the rents and profits, and may hand over the personal estate to the husband."

It is difficult to reconcile the above dicta as to the discretionary power of the trustee with the case of *Lady Elibank v. Montolieu* (a), where the bill was filed by the wife, as next of kin of an intestate deceased, against her husband and the administrator, who claimed to retain her distributive share of the personalty in part satisfaction of a bond debt due to himself (b) from the husband, and a reference for a settlement on the plaintiff and her children was directed. Lord Loughborough held "that, the wife's equity being clear, the novelty in the mode of asserting it was not material." This decision certainly removes the wife's equity from the technical basis upon which it is usually rested, (namely, that equity will not be afforded, unless equity is yielded); and places it upon the much more satisfactory ground, that equity will always enforce a right where there is a trustee against whom to enforce it (c). But the case has not met with universal approbation, and is contrary to many earlier authorities, See *Bosvil v. Brander* (d), and the cases there cited; and see also 1 Roper on Husband and Wife, 262. A distinction has been said to exist between the case of a *corpus* and a life interest, that the wife may apply in the former case, not in the latter.

(x) 4 Ves. 18.

(y) This is dispensed with when the value of the property is under 200l., *Elworthy v. Wickstead*, 1 Ja. & W. 69; but the wife must be made a party to a bill to recover the property, although under that amount, *Bailey v. Dennett*, 3 You. & C. 459. The Vice-Chancellor took the wife's consent in court, though an infant, *Gullen v. Gullen*, 7 Sim. 236; but in *Stubbs v. Sargon*, 3 Jurist, 1118, the Master of the Rolls doubted the propriety of this, but it proving to be a case of separate estate, made

the order for payment to the lady herself.

(z) 10 Ves. 90.

(a) 5 Ves. 737.

(b) See *Exp. O'Ferrall*, 1 Gl. & Ja. 347, where a set-off of a debt due from the husband (who was a bankrupt), to the testator, against a legacy given to the wife, was made subject to her equity.

(c) So a mortgagor may restrain acts by a trustee for sale which he could not restrain if the power of sale were in the mortgagee himself, *Anon.* 6 Mad. 10.

(d) 1 P. W. by Cox, 458; and see *Ball v. Coutts*, 1 Ves. & B. 300.

If the husband sue in the ecclesiastical court for the recovery of his wife's legacy, or share as next of kin, the executor or administrator may have an injunction in Equity to restrain him, and to enforce a settlement upon the wife. *Gardner v. Walker* (d).

6. Where the husband and wife are by domicile or birth subject to a foreign law, which does not recognize the wife's right to a settlement, the circumstance that the wife's property is subject to the jurisdiction of a Court of Equity here, will not entitle her (e).

7. It is generally treated as clear, on the authority of *Turner's case*, and the cases which followed that decision (stated, *ante*, p. 9), that the wife has no equity to a provision out of her equitable terms of years (f).

The questionable character of those cases has been already adverted to, and it is submitted that, if not in words, they are in effect, overruled by the following case of *Sturges v. Champneys*. The wife's equitable interest under an elegit sued out by her trustee is in the nature of a chattel real, and subject to the same rules as her equitable interest in a term of years (g).

(d) 1 Str. 503.

(e) *Copple v. Cadell*; *Sawer v. Shute*, 1 Anst. 63; *Austruther v. Adair*, 2 Myl. & K. 513.

(f) See also *Bates v. Dandy*, 2 Atk. 208; *Jewson v. Moulson*, 2 Atk. 421; *Incladon v. Northcote*, 3 Atk. 435; 1 Rop. Husb. & W. by Jacob, 271. The authority of the cases of *Bates*

*v. Dandy*, and *Incladon v. Northcote*, is impeachable also on another ground, namely, that the wife's interest in those cases was not an equitable term, but a *personal chattel* (in the first a mortgage debt, and in the second a portion), secured by a term of years.

(g) *Lord Carteret v. Paschal*, 3 P. W. 197, 201.

STURGES v. CHAMPNEYS. L. C. (Aug. 2 and Nov. 7, 1839.)

*A Husband being entitled in Right of his Wife to certain Estates for her Life, subject to outstanding Terms of Years created for raising Portions, the Assignee in Insolvency of the Husband files his Bill, to be declared entitled to the Estates, subject to the prior Charges, during the joint Lives of the Husband and Wife :—Held, that the Wife has an Equity for Maintenance out of the Estates.*

THIS was an appeal from a decision of the Vice-Chancellor. The facts are sufficiently stated in the judgment (a).

Messrs. *Wigram, Jacob, Richards, Stuart, Parry, Hodson, Reynolds*, for the several parties.

*Nov. 7.*—Lord CHANCELLOR.—The title to the property in question, stated by the bill to be of the value of 10,000*l.* a year, or thereabouts, is under the will of Sir Roger Martyn, by which, after giving certain annuities to his unmarried daughters, which were to cease on their marriage, he devised all his real estates to trustees, for a term of 500 years, in trust by and out of the rents and profits, or by sale, to pay so much of his debts, funeral expenses, legacies, and annuities, as his personal estate should be deficient to pay; and, subject to that term, he devised his estate to his son for life, remainder to his sons in tail, remainder to the same trustees for a term of 1000 years, in trust after any of his daughters should have come into possession upon failure of issue of his son, by sale or mortgage, to levy, raise, and pay to each of his said other

(a) Cases cited were *Prior v. Hill*, 4 Bro. C. C. 138; *Elliott v. Cordell*, 5 Madd. 156; *Aguilar v. Aguilar*, 5 Madd. 414; *Burdon v. Dean*, 2 Ves. jun. 607; *Lumb v. Milnes*, 5 Ves. 517; *Freeman v. Pasley*, 3 Ves. 421; *Murray v. Lord Elbank*, 10 Ves. 88; *Ex parte Blagden*, 2 Rose, 219; *Ex parte Thompson*, 1 Deacon, 90; *Oswell v. Probert*, 2 Ves. jun. 179; *Jones v. Jones*, 8 Sim. 633, (in which it was held that the doctrine of priority among incumbrancers, gained by giving notice to trustees, did not apply to real property, the Vice-Chancellor taking the distinction, that personal property is held by possession, while real property is held by title.)

daughters then living, 10,000*l.*, and subject to the trusts of such term, to the use of his eldest daughter and her issue, with remainder to the use of his second daughter Lady Champneys for life, remainder to her issue, to her first and other sons in tail, with remainders over. The bill then states the death of the son without issue in 1831, and the previous death without issue of the eldest daughter; and that Lady Champneys, therefore, on the death of the son, became entitled as tenant for life. It then states that two of the daughters of the testator remaining unmarried, were entitled to their annuities under the 500 years' term, but that all else had been paid, and that the sum of 41,000*l.* had under a decree of this court been raised to satisfy the trusts of the term for securing the debts, and that all the estates, except part included in the former mortgage of 7000*l.*, had been mortgaged to the parties who advanced the 41,000*l.*, and that the legal estate in all the property was vested either in the mortgagees of the 41,000*l.* or of the 7000*l.* Having before stated that Sir Thomas Champneys in 1827 had taken the benefit of the Insolvent Debtors' Act, and had executed the usual conveyance of his property, and that the plaintiff has been appointed assignee, and that Sir Thomas Champneys had again taken the benefit of the act in 1834, the bill alleged that, owing to the legal estate being vested in or held in trust for the several mortgagees, the plaintiff was unable to take or to obtain possession of the lands, or to enter into the receipt of the rents and profits by means of any legal process; and it prayed a declaration of the title of the plaintiff (as such assignee) to the life estate of Lady Champneys during her coverture, subject to the prior incumbrances, and for the consequential relief. The defendant by her answer stated that she had, to enable her husband to pay his debts, given up the settlement on her marriage, and had derived no maintenance from her husband since 1824, and claimed a settlement and maintenance out of the rents and profits of her own estate.

The case was heard before the Vice-Chancellor on the 22d July last, when his Honor by his decree declared the plaintiff, as such assignee, was entitled to the estates and the rents and profits thereof from the death of the son during the coverture

of Lady Champneys, subject to the prior charges and incumbrances; and that Lady Champneys was not entitled to any settlement or allowance for her maintenance and support out of the rents and profits thereof; and he dismissed the bill against her with costs, and referred it to the Master to take an account of the rents and profits received by Sir Thomas Champneys since the date of his last discharge.

The effect of this decree is to give, by the interposition of this court, to the assignee of an insolvent husband, the whole of the income of the life estate of the wife, leaving her entirely destitute. I have not had the advantage of seeing any note of the judgment of the Vice-Chancellor (*b*), and have therefore no other knowledge of the grounds on which it was founded than what I was able to collect from the arguments of counsel who appeared before me in support of it; and as I understand the arguments, it was contended the court will not secure a provision for the wife unless the property is such as to be a proper subject for equity; and in this case the devise for Lady Champneys is of a legal estate for life, and it was by the accident only of the prior incumbrances being still subsisting, that the plaintiff is compelled to come into this Court.

For many purposes this Court, acting on the principle of following the law, will deal with property coming under its

(*b*) The Vice-Chancellor, in the course of his judgment, used the following expressions:—"I cannot help saying, during all my experience when at the bar, and subsequently, I never heard it suggested in such a case as the present, that the husband was disabled from making a title to the estate he had during the coverture in estates devised during the life of the wife. It would, in my opinion, be a course pregnant with fearful consequences, if I were to hold that a devise to the wife, merely because the legal estate was outstanding, was so far a mere creature of equity in her that she might file a bill and compel her husband to make a settlement on her. I never heard that suggested, though it is plain the point must have occurred over and over again in common dealing with estates." "Here it appears there was nothing like coming to equity, as in the case of filing a bill against the

person representing the wife's estate, nor against any persons who might in a limited sense have been considered a trustee for her: no such thing: except the mere formal fact that the dry legal interest was outstanding, the matter is to be considered, to all intents and purposes, in precisely the same manner as if Sir Robert Mostyn had devised a mere legal estate, and if he had, there would not have been the least question raised. It appears to me, notwithstanding the discussion that has taken place, there is no similarity between this case and those cited, and upon the best consideration I can give the matter, I am of opinion I ought not to do so dangerous a thing as to countenance the claim made in this suit on behalf of Lady Champneys, but to give Sturges, and those who conducted it after his interest was satisfied, permission to dismiss it as against her."

cognizance, the legal estate being outstanding, according to the rights of the parties as they exist in law, but that is far from being universally true. *Cholmondeley v. Clinton*, and the other authorities on which that decree is founded, are instances to the contrary. There are many cases in which this Court will not interfere with the right which the possession of a legal estate gives, though the effect will be directly opposed to its own principles as administered between parties having purely equitable interests, such as in cases of joint incumbrances without notice, giving the preference to the later incumbrancer who procures the legal title. It may be regretted that the rights of parties should thus depend on accident, and be decided, not according to any merits, but upon grounds purely technical; that has arisen from the jurisdiction of law and equity being separated, and from the rules of equity, better adapted than the simplicity of common law to the transactions of the present state of society, though applied to subjects without its own exclusive jurisdiction, having in many cases been extended to control matters purely subjects of the jurisdiction of the Courts of Common Law. Hence arises the well known and beneficial rule of this Court, that he who asks for equity must do equity. This Court refuses its aid to give the plaintiff what the Courts of Law would give him if the Courts of Common Law had jurisdiction to enforce it, without imposing on him conditions which the Court considers he ought to comply with, though the subject of the condition is one which this Court would not otherwise enforce. If, therefore, this Court refuses to assist a husband who has abandoned his wife, or the assignee of an insolvent husband, without securing out of it for her a proper maintenance and support, it not only does not violate any principle, but acts in strict conformity with the rule by which it regulates its proceedings in other cases.

It was argued, that it having been held in *Lady Elibank v. Montelieu*(c), that a wife may come into this Court to assert her title to a settlement, the claim could no longer be put on the ground of compelling the husband or assignee

seeking equity to do equity. In this case the assignee is plaintiff, and it is not necessary to go beyond the facts before me. If that case were indeed applicable to the present, it would only prove that Lady Champneys might have come herself into this Court as plaintiff, to claim that which she now asks.

I am disposed to take this view of the case, because, if the authorities support Lady Champneys' equity, as a condition which this Court imposes as the price of the assistance which he asks of the Court, the nature of the estate of the wife, as the subject-matter in contest, does not seem to be important. On a careful examination of the authorities, I do not find the time at which the Court did not assume this jurisdiction in favour of the wife.

In *Bosvil v. Brander* (d), in which the wife was mortgagee in fee, and the decision was against her, she being plaintiff, the Master of the Rolls recognizing the rule says, that it might have been a matter of different consideration if the assignee had been plaintiff in equity, and desired the aid thereof to strip the unfortunate widow of all that she had in the world, towards the doing which, equity would hardly have lent its assistance. Many cases follow, in which the principle was recognized; and in *Burdon v. Dean* (e), the assignee of a bankrupt husband filed a bill, praying he might be declared entitled, during the joint lives of the bankrupt and wife, to the income of certain freehold, leasehold, and personal estates to which the wife was entitled for life; on which the Master of the Rolls said, "I have no objection to what they can get at law, but if they come into this Court, I will not extend the arm of this Court to give them any other part of the property without a consideration for it; therefore, let it be referred to the Master to lay proper proposals before him." It was said the order in this case was by consent, but I think that it is immaterial, as it does not affect the observation of the Master of the Rolls, for which alone the case is of any value. In *Oswell v. Probert* (f), the husband having become bankrupt, Lord Rosslyn said, "When persons claiming the right of the husband are obliged to come into an equi-

(d) 1 P. Wms. 458.

(e) 2 Ves. jun. 607.

(f) 2 Ves. jun. 680.

table jurisdiction to obtain the benefit of any part of the property, the destination of which is for the enjoyment of the husband and wife, the Court will not apply it to the use of the husband, leaving the wife to starve." Whatever the husband takes in right of the wife is a provision for both; and in *Ball v. Montgomery* (g), the equity of the wife was put on the same ground. In *Brown v. Clark* (h), Lord Alvanley said, "the assignees of the husband must make a provision for the wife before they can call it out of a Court of Equity." In *Freeman v. Pasley* (i), Lord Rosslyn directed a provision for the wife against the assignee of the husband on the same principle. In *Mitford v. Mitford* (j), Sir W. Grant said, "It is on the ground that the assignees want the assistance of the Court to reduce the property into possession that the Court imposes on them the condition on which alone it will assist the husband to obtain it." In *Wright v. Morley* (k), Sir William Grant said, "In *Pryor v. Hill* it was contended that the equity of the wife did not extend to the case of a life interest, upon the principle that the husband becomes absolute purchaser of that by the marriage, in consequence of the obligation to maintain his wife thereby contracted." That argument, however, did not prevail. The life interest passes to the assignee subject to the ordinary condition for a settlement. In *Elliot v. Cordel* (l), though the Court thought, that as to the property of the wife, the title of particular assignee then in dispute was good against the claim to maintenance out of it, it is said if the husband had been bankrupt the Court would have fastened on his assignee the obligation of maintaining the wife out of any property; which must be understood to assume the case of the assignee applying for the assistance of this Court to obtain such property.

From these authorities, and many others which recognize the same principle, it appears that the equity which the Court administers in securing a provision of maintenance for the wife, is founded on the well-known rule of compelling a

(g) 3 Brown, 345.

(h) 3 Ves. 168.

(i) 3 Ves. 421.

(j) 9 Ves. 101.

(k) 11 Ves. 21.

(l) 5 Mad. 149.

party who seeks equity to do equity, and it is not possible to conceive a case more strongly calling for the application of that rule. The common law gives to the husband the enjoyment of the life estate of the wife, on the ground that he is liable to maintain her, and makes no provision in the event of his failing or becoming unable to perform that duty. If the wife's life estate be attainable by the husband or the assignee of the husband at law, the severity of the law must prevail; but if it cannot be reached otherwise than by the interposition of this Court, equity, though it follows the law, and therefore gives to the husband or his assignee the wife's estate, withholds its assistance till it has secured to the wife the means of subsistence; it refuses to hand over to the assignee of the husband, to the exclusion of the wife, the income of the property which the law intended for the maintenance of both. On the same principle, the ordinary interposition of this Court, which compels a settlement of the property on married women, was originally founded, though the wife is permitted actively to assert her equity as plaintiff; and if such be the principle, what difference can it make, when the assignee of the husband is applying to the Court for assistance to obtain the property, that the estate of the wife is not a trust, but the recovery at law is only prevented by the existence of a prior legal estate? It happens, however, that in *Oswell v. Probert* (before referred to) the estate of the wife was the same as in this case. The testator had devised his estate to trustees in fee, on trust to pay certain annuities and legacies, and the trustees were directed to stand seised to the use of his daughter, the wife of the bankrupt, for her life. The estate had not been sold to pay the prior charges, but it being evident that the trusts were subsisting and the legal estate in the trustees, the Court said the assignees were in the place of the husband not maintaining his wife, and declared that a provision was to be made for her. Such being the principle of this Court, and such the authorities in favour of the wife, no case has been referred to in support of the decree. It may be thought that the cases of *Waters v. Sanders*(m), and *Tudor v. Samyne*(n), are opposed to this rule.

(m) 1 Eq. Ab. 58.

(n) 2 Vern. 270.

It is, however, to be observed, that in the former there had been a decree before the assignment to the husband, and that decree may have been for payment to him. The part of the latter case which applies to the present is not easily explained; as it appears from the case, though so early as 1692, that the rule of not assisting the husband to property of the wife without making provision for the wife was well known. It was however properly founded on the decision of *Sir Edward Turner's case*(*o*), at which Lord Nottingham, in *Pitt v. Hunt*(*p*), expressed great surprise, wherein Lord Hardwicke, in *Jewson v. Moulson*(*q*), seems to have joined, and he says that the rule, that the husband cannot come into this Court for the fortune of the wife without making a provision for the wife, is a rule of equity founded on natural justice.

I have carefully considered the decisions on this subject, and have given them my best consideration, which I always think it right to do when I have the misfortune to differ from the judge whose decision I am called on to review, not only from the respect justly due to such decision, but also to afford to the parties, or those who advise them, the means of weighing the value of the judgment I feel called on to pronounce; but I think it right to guard against the supposition which may be entertained of my thinking this a case of difficulty or doubt. I did not feel any such difficulty or doubt at the time of the argument, and none has been since suggested by the subsequent consideration I have given to the case.

I must reverse the decree of the Vice-Chancellor, and refer it to the Master to approve of a provision for the maintenance and support of Lady Champneys out of the income of the estate.

(*o*) 1 Vern. 7.

(*p*) Id. 18.

(*q*) 2 Atk. 419.

LAW BOOKS RECENTLY PUBLISHED.

---

I.

**SUGDEN'S VENDORS and PURCHASERS.**—Tenth Edition. A Practical Treatise of the Law of Vendors and Purchasers. By the Right Hon. Sir EDWARD SUGDEN. 3 vols. royal 8vo. 3*l.* 10*s.* boards.

II.

**SUGDEN ON POWERS.**—A Practical Treatise of Powers. The Sixth Edition. By the Right Hon. Sir EDWARD SUGDEN. In two large vols. Price 2*l.* in boards.

III.

**SUGDEN'S LAW OF WILLS.**—An Essay on the Law of Wills, as altered by 1 Vict. c. 26. By HENRY SUGDEN, Esq. of Lincoln's Inn, Barrister at Law. In 8vo. Price 8*s.* boards.

IV.

**JARMAN and BYTHEWOOD'S CONVEYANCING,** — Third Edition. By GEORGE SWEET, Esq. of the Inner Temple, Barrister at Law. Vols. V. and VI. with extensive Alterations and Additions.

In this edition the Precedents are corrected and adapted to the present state of the Law, new Forms supplied, and the Notes on the Law of Conveyancing, which were formerly dispersed among the Precedents, are collected into distinct treatises at the commencement of each title; and such subjects as appeared deficient in the former edition are completed. By means of enlarging the page and the bulk of each volume, with the aid of the space gained by the omission of obsolete matter, the work will be completed in Ten Volumes. Volumes V. and VI. contain the titles Mortgages, Transfers and Reconveyances of Mortgages, Nominations of New Trustees, Notices and Partitions. Price 2*l.* 10*s.* boards. Vol. IV. containing titles Leases, Memorials, &c. &c. will be published in a few weeks; and the remaining volumes as expeditiously as may be consistent with a due regard to accuracy.

V.

**HAYES'S CONVEYANCING.**—An Introduction to Conveyancing, and the New Statutes concerning Real Property; with Precedents and Practical Notes. By W. HAYES, Esq., Barrister at Law. Royal 8vo. 1*l.* 10*s.* boards.

VI.

**HAYES'S and JARMAN'S CONCISE FORMS OF WILLS.**—Concise Forms of Wills, with Practical Notes. By W. HAYES and T. JARMAN, of the Middle Temple, Esqrs., Barristers at Law. In 12mo. Price 10*s.* 6*d.* boards.

VII.

**SWEET ON WILLS.**—The Statute 7 Will. 4 & 1 Vict. c. 26, amending the Law of Wills, with a Popular Introduction, and Practical Notes; and a Tabular Summary of the Old and New Law relating to Wills, and Short Forms. By GEORGE SWEET, Esq., of the Inner Temple. In 12mo. Price 6*s.* boards.

**LONDON :**  
**PRINTED BY C. ROWORTH AND SONS,**  
**BELL-YARD, TEMPLE-BAR.**











